TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~285~~ 73.

THE YOUNG WOMEN'S CHRISTIAN HOME, APPELLANT,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

No. ~~286~~ 74.

BARBARA FAUL AND ANDREW WASNER, APPELLANTS,

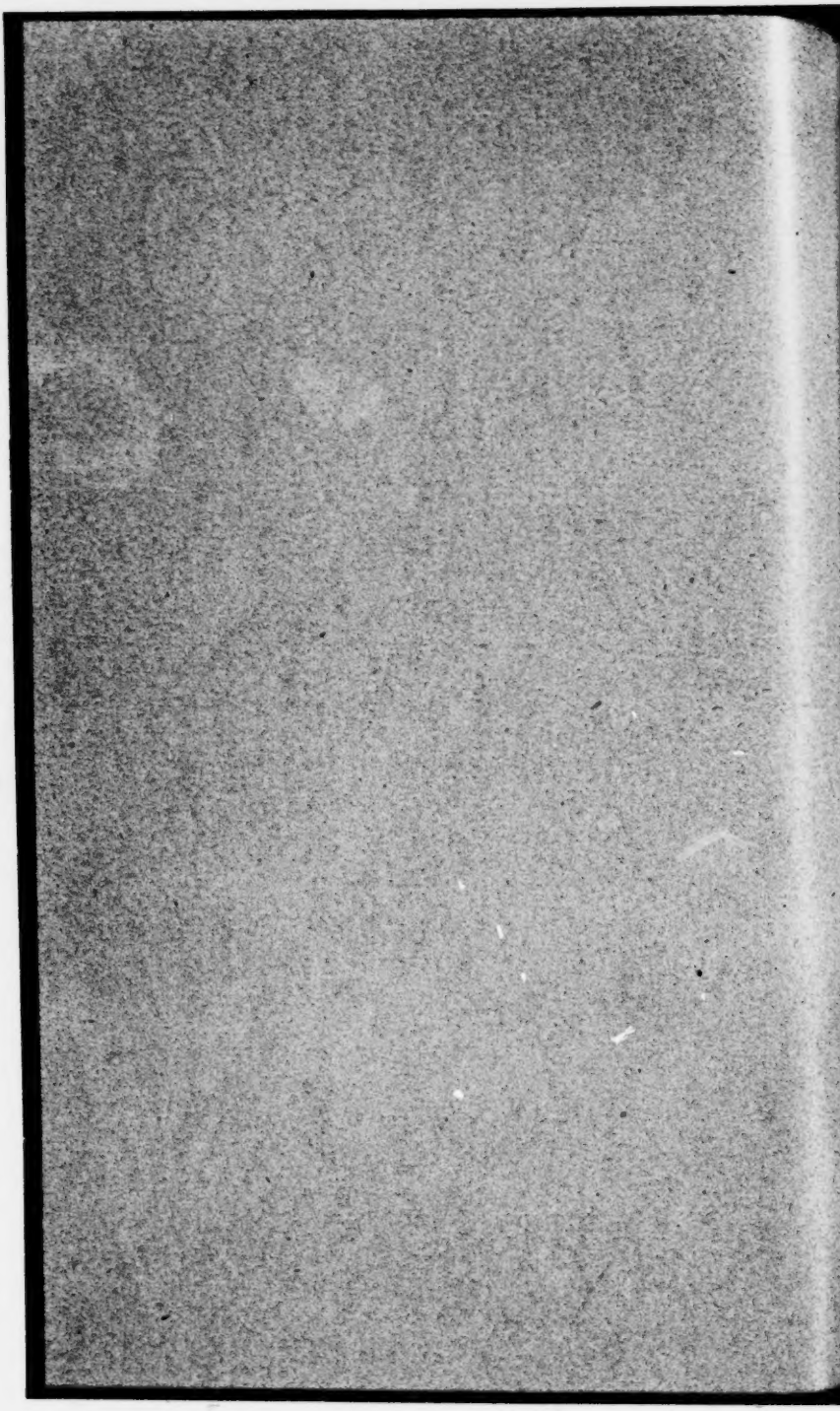
vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 8, 1901.

(18,098 & 18,099.)



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No. 285.

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In the Court of Appeals of the District of Columbia

BARBARA FAUL ET AL., Appellants,
vs.
GEORGE W. HULICK ET AL. } No. 1010.

a Supreme Court of the District of Columbia.

GEORGE W. HULICK ET AL.
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME ET AL. } No. 18968. Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Interpleader.*

Filed Jan. 19, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Equity Business.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul, Andrew Wasner, and John L. French, Administrator of Eugene Rhodes, Deceased. } Equity. No. 18968.

To the honorable justice of the supreme court of the District of Columbia, sitting in equity:

Your complainants respectfully represent to the court:

First. That on the 7th day of March, A. D. 1895, the complainants, George W. Hulick, a resident of Batavia, Ohio, and John B. Larner, a resident of the District of Columbia, were duly appointed and qualified as administrators, with the will annexed, of Sophia Rhodes, deceased; that said last will and testament, after having been duly proven by the witnesses thereto, was, on the 23rd day of February, 1895, duly admitted to probate and record, and letters of administration, with the will annexed, issued to your complainants,

a copy of which said last will and testament is hereto attached, being marked Complainants' Exhibit No. 1.

2 Complainants bring this suit as administrators for the purpose of determining the respective rights of the defendants herein to share as distributees in the personal estate of Sophia Rhodes, deceased.

Second. The defendant The Young Women's Christian Home is a corporation under and by virtue of an act of Congress of the United States approved February 23rd, 1886, which corporation exercises its franchises conferred by said act of Congress in the District of Columbia. The defendants The Young Women's Christian Home, Barbara Faul, and Andrew Wasner are all sued in their own right, and the said John L. French is sued as administrator of the estate of Eugene Rhodes, deceased, for the purpose of determining what share they are respectively entitled to, if any, in the assets of the estate of Sophia Rhodes, deceased.

Third. Your complainants further represent that on the 27th day of January, 1895, one Oliver Wheeler Rhodes, a resident of the District of Columbia, the husband of said Sophia Rhodes, now deceased, departed this life in the city of Washington, D. C., leaving Sophia Rhodes, his widow, and Eugene Rhodes, his son and only heir-at-law, surviving, and your complainants are advised and believe that at the time of the death of said Oliver W. Rhodes at Washington, D. C., his wife, the said Sophia Rhodes, and their only child, Eugene Rhodes, were temporarily sojourning at Heidelberg, Germany. In response to a telegraphic communication advising them of the decease of said Oliver W. Rhodes, they embarked at Brehmerhaven, Germany, on the steamer Elbe, on or about the 29th day of January, 1895, intending thereby to return to America, in answer to said telegraphic communication.

3 Your complainants are advised, and being so advised aver, that during the progress of said steamer, to wit, in the North sea on or about the 30th day of the said month of January, 1895 (about five o'clock in the morning of said day), it, the said steamer, was run into by another vessel called the Craithie, which struck the Elbe amidship, and was so injured that within a short space of about twenty minutes the said steamer Elbe foundered and sank out of sight. Your complainants are advised and on information believe that said Sophia Rhodes and Eugene Rhodes, her son, being passengers on said vessel, with many other passengers on said vessel lost their lives as the result of said collision and the foundering of said steamer Elbe; that on or about the 8th day of March, 1895, your complainants were advised by telegraphic communication received from the American minister at The Hague that a body had been recovered from the North sea by some fishermen, and that certain papers and a ring found upon said body indicated it to be the body of Eugene Rhodes; that thereafter, to wit, on the 7th day of March, 1895, an inquest was held at Gravesande, Holland, upon said body, and the same was identified as being that of Eugene Rhodes, the son of said Sophia Rhodes and said Oliver W. Rhodes, a certi-

fied copy of which said inquest was transmitted to these complainants by the United States consul at Rotterdam, together with the papers and ring hereinbefore referred to, which said ring has engraved thereon the name of Sophia Rhodes, and your complainants have every reason to believe, and so believing aver, that said body was that of Eugene Rhodes. Your complainants further state that the body of Sophia Rhodes has never been recovered, nor have they received any information or knowledge whatever as to its
4 whereabouts. Your complainants have filed herewith, marked Complainants' Exhibit No. 2, a certified copy of said inquest held upon the body of said Eugene Rhodes at Gravesande, together with a translation thereof made by the United States consul at Rotterdam.

Fourth. Your complainants further represent to the court that as administrators of the estate of Sophia Rhodes, deceased, they duly qualified and took possession of all the assets belonging to the said Sophia Rhodes, deceased, of which they could obtain any knowledge or information, which said assets are fully set forth in inventories filed by your complainants in the orphans' court of the District of Columbia; that thereafter your complainants, in accordance with the authority conferred upon them as such administrators, proceeded to administer the estate of said Sophia Rhodes, deceased, and on the — day of ——, 1896, after having paid and satisfied all legal debts of said Sophia Rhodes, they filed in said court their first and final account, which said account, after having been duly considered by the court, was passed and recorded, a certified copy of which said account, showing the entire receipts and disbursements made by said administrators, is filed herewith and prayed to be taken as a part of their bill of complaint, being marked Complainants' Exhibit No. 3.

Fifth. Your complainants further represent that the said Sophia Rhodes, if her said son, Eugene Rhodes, did not survive her, left as her next of kin and only heirs and representatives, as your complainants are informed and believe, the following-named persons: Andrew Wasner, an only brother, who resides at Batavia, Ohio, and Barbara Faul, an only sister, who resides at Batavia, Ohio; that said Eugene Rhodes died intestate, and if he survived his mother, the said Sophia Rhodes, left as his only heirs-at-law and next
5 of kin the said Andrew Wasner and Barbara Faul, brother and sister of his said mother, Sophia Rhodes, deceased; John G. Rhodes, a brother of said Oliver W. Rhodes, deceased (then residing in Georgetown, Ohio). The said John G. Rhodes, afterwards, on the — day of ——, 1897, departed this life intestate, leaving Kate Rhodes, his widow, residing at Georgetown, Ohio, and the following-named children: Dwight Rhodes, of Georgetown, Ohio; John Rhodes, of Nashville, Tenn.; Belle Rhodes Latham, wife of J. C. Latham, of Burlington, Iowa; Genevieve Rhodes, of Cincinnati, Ohio, and Mary Rhodes Story, wife of John Story, of Cincinnati, Ohio; Alice M. Fitch, wife of Michael H. Fitch and sister of Oliver W. Rhodes, deceased, residing at Pueblo, Colorado, and Melville

Rhodes, a brother of said Oliver W. Rhodes, deceased, residing at Denver, Colorado.

Sixth. On the 5th day of March, A. D. 1896, the defendant John L. French was duly appointed and qualified as administrator of the estate of Eugene Rhodes, deceased, by the supreme court of the District of Columbia, holding a special term for orphans' court business.

Seventh. Your complainants further represent that the defendant The Young Women's Christian Home, by virtue of the last will and testament of said Sophia Rhodes, deceased, claims an interest in said estate; the said Andrew Wasner and Barbara Faul, as heirs-at-law and next of kin of said Sophia Rhodes at the time of her death, claim an interest in said estate, and the said John L. French, as administrator of the said Eugene Rhodes, deceased, claims an interest in said estate. By reason of said conflicting claims your com-
6 plainants, as administrators of the estate of Sophia Rhodes, deceased, are unable to make distribution of the assets in their hands, and for this reason are compelled to file this their bill of complaint for the purpose of requiring the parties who claim the several interests, as aforesaid, to interplead for the purpose of determining which of said conflicting interests are entitled to receive said estate or any part thereof.

Wherefore your complainants pray:

First. That subpœnas may issue directed to the defendants, requiring them to appear and answer the exigencies of this bill of complaint.

Second. That the defendants be required to interplead among themselves for the purpose of establishing whatever claim or right they may each have to the funds or any part thereof in the hands of your complainants.

Third. And for such other and further relief as the nature of the case may require and to the court may seem fit and proper.

GEORGE W. HULICK,
JOHN B. LARNER,
Adm'rs Estate Sophia Rhodes, Dec'd.

THE STATE OF OHIO, }
Clermont County, } *ss:*

We do solemnly swear that we have read the foregoing bill of complaint by us subscribed and know the contents thereof; that the matters and things therein stated of our own personal knowl-
7 edge are true, and those stated upon information and belief we believe to be true.

GEORGE W. HULICK.

Subscribed and sworn to before me this 28th day of December, A. D. 1897.

STANLEY S. HULICK,
[SEAL.] *Notary Public in and for Clermont County, Ohio.*

Notary fee, 40c.

Joint and Several Answer of Barbara Faul and Andrew Waesner to Bill of Interpleader.

Filed May 20, 1898.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants, *vs.* THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul, Andrew Waesner, and John L. French, Administrator of Eugene Rhodes, Deceased, Defendants.	Equity. No. 18968.

Joint and several answer of Barbara Faul and Andrew Waesner, parties defendant.

8 Comes now the above-named Barbara Faul and Andrew Waesner, parties defendant herein, and, waiving the issuance and service of process, hereby respectively enter appearance herein, — for joint and several answer to the bill of interpleader herein filed say:

1. They admit the allegations contained in paragraph one of said bill.

2. They admit the averments contained in paragraph two of said bill.

3. They admit the averments contained in paragraph three of said bill to be substantially correct as therein set forth so far as they have been advised or have any knowledge in respect of the matters therein stated.

4. They admit the averments contained in paragraph four of said bill, and they further say that, as will appear from the first and final account of the complainants herein, as administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, in said paragraph referred to, said complainants now have in their hands, as such administrators aforesaid, after the satisfaction, payment, and discharge of all lawful claims, debts, and charges against the said estate, including the administraton thereof, for distribution to and among those entitled thereto, the sum of $14,891.89.

5. They admit the averments contained in the fifth paragraph of said bill, and aver that the defendant Barbara Faul is the only sister and the defendant Andrew Waesner is the only brother of said Sophia Rhodes, deceased, and that they are the only heirs-at-law and next of kin of said decedent, and as such, upon the death intestate of the said Sophia Rhodes, are entitled to her entire estate, both real and personal, as hereinafter set forth.

9 6. They admit the averments contained in the sixth paragraph of said bill.

7. They admit the averments contained in the seventh paragraph of said bill.

(*a.*) Further answering, these defendants say that by the terms and provisions of the last will and testament of Sophia Rhodes, deceased (Exhibit No. 1 to said bill herein), as set forth in item 2 thereof, the said testatrix gave, devised, and bequeathed to her said son and only child, Eugene, all her property, real, personal, and mixed, of whatsoever nature, kind, or description, including moneys, credits, and evidences of indebtedness of which she might be possessed at the time of her death, to be his absolutely, to hold and dispose of as unto him might seem good and proper, subject only to the provisions of item 1 of said will, which said item 1 provided that during the lifetime of the husband of said testatrix, Oliver Wheeler Rhodes, he should receive the one-half of the net income from all the properties and estate of testatrix. The said husband, Oliver Wheeler Rhodes, predeceased both his said wife, the testatrix aforesaid, and the said son, Eugene Rhodes. These defendants further say and aver that the said Eugene Rhodes, son of said testatrix, died intestate, and in the same disaster at sea, set forth in the bill herein, with his mother, the said testatrix; and they aver that the fact is unknown and unascertainable whether the son survived the mother (testatrix) or whether the mother survived the son; and that her said estate therefore did not vest in the said son, Eugene Rhodes, and hence did not descend to the heirs-at-law and next of kin of the said Eugene Rhodes, and they as such heirs-at-law and next of kin are not entitled to a distributive share in said estate.

(*b.*) Defendants further say that by the terms and provisions of said will, as contained in item 3 thereof, said testatrix directed that in the event of the death of her said son, Eugene Rhodes, before the decease either of said testatrix or of her husband, the said Oliver Wheeler Rhodes, she then gave, devised, and bequeathed all of her said property and estate, subject only to a life estate in the rents and profits arising therefrom to her said husband, unto the Young Women's Christian Home, in the city of Washington, District of Columbia, party defendant herein. The husband of said testatrix predeceased both wife and son, as hereinabove averred, and the said son, Eugene Rhodes, and the said testatrix having perished in the same disaster at sea, in the steamer Elbe, as above averred, and the fact is unknown and cannot be ascertained whether the said son survived his mother, said testatrix, or not, therefore the said Young Women's Christian Home, party defendant herein, is not, by reason of said clause of said will, entitled to the said estate.

(*c.*) And these defendants further say that by the terms and provisions of said will, as contained in item 4 thereof, said testatrix directed that in the event of said testatrix becoming the survivor of both her husband, the said Oliver Wheeler Rhodes, and of her son, the said Eugene Rhodes, she then gave, devised, and bequeathed all her property, real, personal, and mixed, of whatsoever nature, kind, or description, to the Young Women's Christian Home, of the city

of Washington, in the District of Columbia (party defendant herein and above referred to); to have and to hold the same absolutely and forever for the good of that institution; and de-
11 fendants say that the said testatrix and her said son, the said Eugene Rhodes, having lost their lives in the same disaster at sea, on the steamer Elbe, as above, it has never been ascertained and cannot be determined whether the said testatrix survived both her said husband and son, and that the said Young Women's Christian Home, named in said will and party defendant herein, is therefore not entitled to the whole or any part of said estate by virtue of said will.

(*d.*) And these defendants further say and aver that the said Sophia Rhodes, testatrix aforesaid, and her said son, Eugene Rhodes, both perished by a common disaster at sea on the steamer Elbe, as hereinabove and in the bill herein averred, and that their death was occasioned by one and the same cause; that the fact is not known and cannot be ascertained whether the said Sophia Rhodes survived her said son, Eugene, or whether he survived his said mother, and, further, that there is no evidence to the contrary that both mother and son died at the same time; wherefore these defendants are advised by counsel, and therefore aver, that they, as such heirs-at-law and next of kin of said decedent, Sophia Rhodes, are entitled to receive the entire estate and fund here in controversy and now in the hands of the complainants herein, as such administrators aforesaid, as in case of the death intestate of the said Sophia Rhodes.

Wherefore these defendants aver:

1. That the said John L. French, administrator of the said Eugene Rhodes, deceased, party defendant herein, is not entitled to the said property and estate or any part thereof in the hands of said
12 complainants, as aforesaid, for the reason that in contemplation of law the estate of the said Sophia Rhodes never vested, either by devise or descent, in the said Eugene Rhodes, deceased, and therefore did not descend to his heirs-at-law or next of kin.

2. That in contemplation of law the death of the said Eugene Rhodes did not occur before the death of the said testatrix, as provided in item No. 4 of said will, and therefore the said Young Women's Christian Home, of the city of Washington, in the District of Columbia, and party defendant herein, is not entitled to said estate or any part thereof under said clause of said will.

3. That in contemplation of law the said testatrix did not become the survivor of her son, the said Eugene Rhodes, as provided in item 4 of said will, and therefore the said Young Women's Christian Home is not entitled to said estate or any part thereof under said clause of said will.

4. That in contemplation of law the death of the said Sophia Rhodes and of the said Eugene Rhodes occurred at the same time, and therefore said estate descended to these defendants as the only heirs-at-law and next of kin of the said decedent, Sophia Rhodes, as in case of intestacy.

Wherefore, the premises considered, these defendants pray:

1. That they be decreed to be the only heirs-at-law and next of kin of the said Sophia Rhodes, deceased, and as such entitled to the whole estate of the said Sophia Rhodes, deceased, and entire fund here in controversy, as in the case of the death intestate of said Sophia Rhodes.

2. That the complainants herein, as such administrators
13 aforesaid, be decreed to pay over to these defendants all moneys and assets now in their hands belonging to said estate, and here in interpleader, and to indorse and deliver to them all notes, mortgages, and other evidences of indebtedness or securities, if any there be, as well all papers of every description now in their possession belonging to said estate.

3. And for all such other and further relief as may be proper in equity and as the nature of the case may require.

BARBARA FAUL,
ANDREW WASNER,
Parties Defendant.

J. M. WILSON,
A. A. HOEHLING, JR.,
Solicitors for said Defendants.

STATE OF OHIO, *Hamilton County,* } ss:

Before me, the undersigned, personally appeared Barbara Faul and Andrew Waesner, who, being by me first duly and severally sworn, on their respective oaths say:

That they have read the foregoing answer by them subscribed and know the contents thereof; that the several matters and things therein stated of their own knowledge are true, and those stated as upon information and belief they believe to be true.

BARBARA FAUL.

14 Subscribed and sworn to before me this 14th day of May, A. D. 1898.

[SEAL.] F. SANFORD BROWN,
Notary Public.

* * * * * * *

THE STATE OF OHIO, *Clermont County,* } ss:

Before me, the undersigned, personally appeared Andrew Waesner, who, being by me first duly sworn, on his oath says he has read
the foregoing answer by him subscribed and knows the con-
15 tents thereof; that the several matters and things therein stated of his own knowledge are true, and those stated as upon information and belief he believes to be true.

ANDREW WASNER.

Sworn to and subscribed before me this 16th day of May, A. D. 1898.

DAVID K. McDONALD,
[SEAL.] *Notary Public in and for Clermont County, Ohio.*

* * * * * * *

16 *Answer of the Young Women's Christian Home.*

Filed Oct. 22, 1898.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK ET AL. vs. YOUNG WOMEN'S CHRISTIAN HOME. } Equity. No. 18968.

The defendant, The Young Women's Christian Home, for answer to so much and such parts of the bill of complaint in the above-entitled cause as it is advised it is material for it to make answer unto, answering, says:

1, 2. It admits the residences of the parties and the capacity in which they sue and are sued to be as stated in the first and second paragraphs of the bill.

3. It further admits the death of Oliver Wheeler Rhodes, leaving Sophia Rhodes, his widow, and Eugene Rhodes, his son and only heir-at-law, surviving; that said survivors were then temporarily at Heidelberg, Germany, and that both of them were drowned at sea, as set forth in the third paragraph of the bill. It has no personal knowledge as to the recovery of their bodies or the body of either of them, and calls for proof thereof if material.

4. It is willing to admit, for the purposes of this suit, the allegations of the fourth paragraph of the bill as to the administration of the estate of Sophia Rhodes by the complainants.

5. This defendant is without knowledge as to how many and who were the next of kin and only heirs-at-law of Sophia Rhodes in case her son, Eugene Rhodes, did not survive her, nor as to who were his heirs-at-law and next of kin in case he did not sur-
17 vive her, and calls for strict proof thereof in so far as may be material, as of all the allegations of the sixth paragraph of the bill, none of which allegations relate to matters which are within the knowledge of this defendant.

6. It is willing to admit for the purposes of this suit that the defendant John L. French was duly appointed and qualified as executor of the estate of John Rhodes, deceased.

7. This defendant is advised and believes, and therefore avers, that the provisions of the will of said testatrix, taken as a whole, clearly shows her plain intention that unless her son, the said Eugene Rhodes, should survive her, so that he might be the beneficiary of her said will and enter upon and enjoy her estate, the same should pass, to the exclusion of all other persons whomsoever, to this defendant for the purposes of its organization, and it admits that it

claims the estate of the testatrix as the beneficiary which said testatrix plainly intended should receive and make use of the said estate under the conditions and circumstances set forth in said bill. It believes it to be true and is willing to admit for the purposes of this case that, notwithstanding the said plain intent of the testatrix upon the face of her said will, the defendants Wasner, Faul, and French have interposed conflicting claims to the said estate.

And, having fully answered, it prays that it be hence dismissed with its reasonable costs.

THE YOUNG WOMEN'S CHRISTIAN HOME.
By ELIZABETH H. GURLEY, *President.*

J. J. DARLINGTON,
JOHN B. LARNER,
Sol'rs for Def'd't.

18 DISTRICT OF COLUMBIA, *ss:*

I, Elizabeth H. Gurley, on oath say that I am the president of The Young Women's Christian Home, defendant in the above-entitled cause; that I have read the foregoing answer by it, acting as myself, its president, as aforesaid, and know the contents of the said answer, and that the allegations of the said answer are true to the best of my knowledge, information, and belief.

ELIZABETH H. GURLEY.

Subscribed and sworn to before me this 20th day of October, A. D. 1898.

CHARLES L. GURLEY,
[SEAL.] *Notary Public, Dist. of Columbia.*

Answer of John L. French, Administrator.

Filed Oct. 29, 1898.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul, Andrew Waesner, and John L. French, Administrator.
} In Equity. No. 18968.

19 This defendant, John L. French, sole administrator of the estate of Eugene Rhodes, deceased, reserving the benefit of exception to the errors and insufficiencies in the bill of complaint, enters his appearance and for answer to said bill says:

1 & 2. On information and belief he admits the averments contained in the 1st and 2nd paragraphs of said bill.

3. He admits the averments in the 3rd paragraph of said bill ex-

cept so much thereof as alleges that the said Eugene Rhodes, son of Sophia Rhodes, lost his life "as the result of said collision and the foundering of said steamer" mentioned in the said paragraph. Whether said Eugene Rhodes lost his life as the result of said collision and foundering or whether he wholly escaped from that disaster in a lifeboat or otherwise and subsequently lost his life in some other disaster or from some other cause is not known to this defendant nor, so far as he is aware, to any other living person, but if said allegation is relied upon by the complainants or any other party to this suit this defendant asks for strict proof thereof.

4. On information and belief he admits the averments of the 4th paragraph of the bill excepting that this defendant states that on April 9th, 1896, he filed his bill of complaint, in equity, No. 17291, in this court, against the complainants in this cause to obtain from them as administrators *c. t. a.* an accounting in regard to all property in the hands of Sophia Rhodes at and before her death belonging to her husband, Oliver W. Rhodes, or to their son, the said Eugene Rhodes, which suit is still pending and may diminish the balance in the hands of said complainants.

5, 6, & 7. He admits the averments contained in the 5th, 6th,
20 and 7th paragraphs of said bill, except that he avers and submits to the court that it is the duty of said complainants to investigate and ascertain who are the rightful distributees of the estate of Sophia Rhodes, deceased, and that no burden of proof or affirmative action rests or is placed upon this defendant in regard to establishing the rights of Eugene Rhodes in the premises by the filing of the said bill of complaint.

And further answering, with this reservation, this defendant says that upon further investigation being made to ascertain the proper distributees it will appear as follows:

(*a.*) That, as he is informed and believes, said Sophia Rhodes and her son, Eugene Rhodes, engaged and occupied one state-room only on said steamer "Elbe," and said room was on the same side and the same deck of the "Elbe" and about eight feet abaft the point where the prow of the steamer "Craithie" penetrated the hull of the "Elbe."

(*b.*) That it is capable of proof, as this defendant is informed and believes, that said Eugene Rhodes was seen alive after his mother was last seen alive, and that he was seen alive on the deck of the steamer "Elbe," and that she was only seen coming out of her state-room and was not seen on deck after the collision.

(*c.*) That, as this defendant is informed, and therefore avers, said Eugene Rhodes was first proved to be dead by the finding of his body in the North sea, off the coast of Holland, on March 6, 1895, and that said body was not broken, crushed, or even bruised.

(*d.*) That said Sophia Rhodes was of corpulent figure and short-
winded in breathing, and at the time of her death was about
21 fifty-two years old; that said Eugene Rhodes had attained the age of twenty-three years, and, as this defendant is informed and believes, was rather a good swimmer.

This defendant, further answering, says:

(*e*.) That so far as he is aware, except by contrast of the age, sex, build, and health and capacity to swim of said Sophia Rhodes and her son, Eugene, and the facts that the said son was the last one of the two seen alive and that his body was found at the time stated and bore no marks of his being injured by the collision, no proof is obtainable showing in what order of time the deaths of said Sophia Rhodes and her son respectively occurred and even if both of said deaths did occur in the same disaster, and from the same cause (of which there is no certainty) there is no presumption in law on that account, as this defendant is advised, and therefore avers, that both persons died at the same instant of time. This defendant submits that the order of occurrence of the two deaths is of necessity left to be determined by those responsible for rightful distribution from what evidence the case affords, and that any burden of proof in this case rests where it would have rested had any alleged insufficiency of evidence not been foreseen.

This defendant further says that the preponderance of whatever evidence appears to be obtainable is in favor of the son's having survived his mother, and that on the doctrine of probabilities it is incredible, without positive proof, that they died exactly at the same instant of time.

(*f*.) This defendant further says that, as he is advised by counsel, whoever was the only next of kin and heir-at-law of said Sophia Rhodes at the time of her death succeeded presumptively
22 and had *prima facie* right to so much of her property as on the settlement of her estate and payment of her debts remained for distribution, the burden of proof resting on any legatee or devisee claiming any of said property as against such next of kin and heir-at-law; that the said Sophia Rhodes' son, Eugene, took her property, if he survived her, by act of the law and not by virtue of her will, for the reason that what the will sought to give him (his father having predeceased him and his mother) was the very same the law gave him as her sole next of kin and heir-at-law in case of her intestacy, and that title by law is considered to prevail to the exclusion of title by act of the parties.

Further answering, this defendant says:

(*g*.) That as Oliver Wheeler Rhodes predeceased his wife, the said Sophia Rhodes, and their son, Eugene, all the property and estate of said Sophia, by her last will and testament (Exhibit No. 1 to the bill of complaint), especially items 3 and 4 thereof, was devised and bequeathed to the "Young Women's Christian Home" only on the express condition that the death of said Eugene Rhodes took place "before" the death of his said mother, and that she became his "survivor;" and this defendant submits that until proof be made (which he verily believes can never be made) that said condition was fulfilled, namely, that said son died "before" his mother and she became his "survivor," the said property and estate can never pass to or vest in the said Young Women's Christian Home.

(*h*.) This defendant further says that down to a point of time later

than which no human knowledge or evidence exists respecting said Sophia Rhodes and her son, Eugene, the said Eugene, as this
23 defendant is informed and believes, was still in full life, health, and strength, and held his place of being, upon the death of his mother, not only her sole legatee and devisee, but also her sole *heir-at-law* and *next of kin*. All the other defendants herein stood more remote in these relations to her, and this position of advantage was not lost to the said Eugene and his representatives by reason of his death occurring in a relation of time to that of his mother, not perhaps absolutely ascertainable. The life of said Eugene in being, as aforesaid, would continue in contemplation and presumption of law, as this defendant submits, until the expiration of seven years thereafter, or until such earlier date at which his death may be proved to have occurred, by those interested in ascertaining it to have occurred earlier. To the best of the knowledge and belief of this defendant, there is not even a scintilla of evidence that said Eugene Rhodes predeceased or codeceased his said mother, Sophia, and therefore, in contemplation of law, said Eugene remained her sole legatee, devisee, heir-at-law, and next of kin at the time of her death.

(*i.*) This defendant further says that there is evidence to the contrary of the theory of simultaneous death of said Eugene and his mother, namely, his strength, age, sex, health, and ability to swim, and the incidents attending or following said collision, including the fact that said Eugene was seen alive after his mother was seen alive, and that in view of this evidence it would be against probability and reason to find *without evidence* that said Eugene and his mother died at the same instant, while the preponderance of proof is in favor of the survivorship of said Eugene.

(*j.*) This defendant further says that the case does afford
24 some evidence tending to show the order of occurrence of the deaths of said Eugene Rhodes and his mother, namely, the circumstances already referred to, and that though said evidence may not be sufficient, as this defendant submits, to shift the burden of proof from such of the defendants, if any, on whom said burden rests, said burden does not rest on this defendant; and if no burden of proof rests on any of the defendants, none of them having a *prima facie* right, then it must be determined from the evidence which one occurred of the three happenings possible in the case, namely, that said Eugene and his mother died at the same instant of time, or that she survived him, or that he survived her.

The premises considered, this defendant submits:

(1.) That the defendants Barbara Faul and Andrew Waesner are not entitled to the surplus or residue of the estate of said Sophia Rhodes, because if any time, no matter how infinitesimal, intervened between the death of said Sophia Rhodes and that of her son, her property vested either in her said son or in the said "Young Women's Christian Home;" and because said Barbara Faul and Andrew Waesner were not, in contemplation of law, next of kin or heirs-at-law of said Sophia Rhodes at the time of her death.

(2.) That in contemplation of law the death of said Eugene Rhodes did not occur "before" the death of said Sophia Rhodes, as provided for in item No. 1 of her will, and therefore the said Young Women's Christian Home is not entitled to her estate or to any part thereof.

(3.) That in contemplation of law the said testatrix did not become the "survivor" of her son, the said Eugene Rhodes, as provided for in item 4 of said will, and therefore the said Young
25 Women's Christian Home is not entitled to any part of said estate.

(4.) That as there is neither proof nor presumption that said Eugene Rhodes, who is known to have been in full life, health, and strength at and after said collision, ceased to live before or at the same time that his said mother died, he was in contemplation of law her sole legatee, devisee, heir-at-law, and next of kin at the time of her death.

This defendant therefore prays, if it be deemed necessary or proper for him to make any affirmative prayer for relief in the premises, that the complainants, as administrators *c. t. a.*, be decreed to make inquiry, ascertain from all the information accessible, and report how the surplus in their hands ought to be distributed, subject to the approval of this honorable court; whereupon it will appear, as this defendant submits, that said surplus should be distributed to him as the personal representative of the sole legatee, devisee, heir-at-law, and next of kin of said Sophia Rhodes, and that no proof or presumption exists or can be produced to oust him from that position or sustain any adverse claim, and he prays for such other or further relief as the case may require or to the court appears just.

JOHN L. FRENCH, *Adm'r.*

J. W. SMITH.
W. H. DENNIS.
Solicitors for Defendant J. L. French.

DISTRICT OF COLUMBIA:

26 I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated of my own personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN L. FRENCH.

Sworn to and subscribed before me this 22nd day of August, 1898.
[SEAL.]
H. L. RUST,
Notary Public.

Agreed Statement of Facts.

Filed Jan. 22, 1900.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. Larner, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants.
vs.
THE YOUNG WOMEN'S CHRISTIAN Home, Barbara Faul and Andrew Waesner, and John L. French, Administrator of the Estate of Eugene Rhodes, Deceased, Defendants.

In Equity. No. 18968. Bill of Interpleader.

27 It is hereby stipulated and agreed by and between the counsel for the respective parties hereto, interpleaded herein as defendants in the above-entitled cause, that the following shall constitute an agreed statement of *facts* for the trial and determination of this case, the right being hereby expressly reserved to any or either of said parties to object to said admitted facts or any or either thereof upon the ground of the immateriality, irrelevancy, or incompetency thereof, but no objection shall be interposed as to the form of such proof.

Agreed Statement of Facts.

1.

That said Sophia Rhodes heretofore departed this life, as hereinafter more particularly set forth, leaving a last will and testament, a true copy of which is set forth in Exhibit No. 1 to complainants' bill, which said last will and testament has been duly admitted to probate and record by the order and decree of the supreme court of the District of Columbia, holding a special term for orphans' court business, and that the complainants are the duly appointed, qualified, and acting administrators *c. t. a.* of the estate of said Sophia Rhodes, deceased; that the said John L. French is the duly appointed, qualified, and acting administrator of the estate of Eugene Rhodes, deceased, who was the only child or descendant of said Sophia Rhodes, as well as the only child or descendant of her late husband, Oliver Wheeler Rhodes, and that the said Young Women's Christian Association is a corporation duly incorporated, organized, and existing in the District of Columbia.

2.

28 That the said Oliver Wheeler Rhodes departed this life in the District of Columbia on the 27th day of January, 1895; that his said wife and son were at that time in Heidelberg,

Germany: that, being advised of his extreme illness, they started for Bremen to take the next steamer home, receiving a cablegram announcing his death a few hours before they sailed; that they sailed on the steamer "Elbe" at three o'clock p. m. on Tuesday, January 29th, 1895, both occupying the same state-room; that about 5:30 o'clock the next morning, as the ship was going in a southwesterly direction and was about due west of The Hague, she collided with the steamer "Craithie," en route northwesterly from Rotterdam to Scotland, the point of penetration being on the same side and deck of the "Elbe" and about 8 feet abaft of the room occupied by the said testatrix and her son. In about 20 minutes thereafter the "Elbe" went down. One lifeboat, No. 3, got away with twenty-one survivors. Lifeboat No. 5, filled mostly with women, capsized on being lowered to the water and all of its occupants were lost except one Anna Bocker, hereinafter referred to, who succeeded in getting into boat No. 3. Six weeks thereafter, March 6, 1895, the said Eugene's body came up in a fishing net off the coast of Holland; the mother's body was never recovered.

3.

The testatrix was about 52 years of age at the time of her death, was corpulent of figure, and short-winded in breathing. Her son was about 23 years old, was rather a good swimmer, had never been married, and he died intestate.

4.

The said Sophia Rhodes' next of kin, if she survived her
29 said son, were and are her brother and sister, Andrew Waesner and Barbara Faul, defendants herein. If her said son survived her his next of kin were said Andrew Waesner and Barbara Faul, on his mother's side, and on his father's side John G. Rhodes, Melville D. Rhodes, and Mrs. Alice Fitch, brothers and sisters of his father. The said John G. Rhodes has since died, leaving a widow, Katherine Rhodes, of Georgetown, Ohio, and five children, viz., Mrs. Mary R. Story, of Cincinnati, Ohio; Mrs. Belle R. Latham, Burlington, Iowa; Miss Genevieve Rhodes, Cincinnati, Ohio; White Rhodes, Georgetown, Ohio, and John Rhodes, Nashville, Tennessee.

5.

That of the twenty-one persons known to have survived said shipwreck two only, Miss Anna Bocker and John Vevera, have any personal knowledge tending to show the respective movements and situation of the said Sophia Rhodes and Eugene Rhodes, her son, at the time of the disaster aforesaid and immediately preceding their death; and it is further agreed that said Anna Bocker, if produced as a witness on behalf of the defendant John L. French, would testify, and the following is to be taken as her deposition to the effect, that just after the collision she saw the testatrix come out of her cabin, clothed in a blanket over her night-dress, as if to see what the matter was, and that she, the witness, never saw the said Mrs.

Rhodes afterwards; that subsequently (certainly some minutes after) when she, Miss Boeker, went on deck she saw the said Eugene Rhodes just in front of her, and never saw him afterwards, and that the said John Vevera, if produced as a witness in behalf of said Waesner and Faul, would testify, and the following is to be taken as his deposition to that effect, that he is a resident of the city of Cleveland, county of Cuyahoga, Ohio,
30 residing at 339 Burton street; that he has lived in said city for 26 years last past; that from 1893 to 1896 he was a member of the board of county commissioners of Cuyahoga county, Ohio; that since the first day of January, 1896, he has been and now is in the real-estate and insurance business in the city of Cleveland; that he was in Europe in the latter part of 1894 and took passage to return to this country on the steamship "Elbe;" that on the night preceding the disaster to this ship he sat at the same table with a mother and son; that his attention was attracted to them, as they seemed so happy and as the mother seemed so much interested in the boy, and that shortly thereafter he learned that the name of the woman was Mrs. Sophia Rhodes, and that the young man was her son; that after the accident which occurred on January 30th, 1895, when every one was on the deck, he saw these parties on the left side of the boat. The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold.

When affiant first came on the deck he went to the lifeboat on the right-hand side of the vessel, but found it filled with ladies, and no man was allowed to enter the boat, but after it left the vessel a short distance it was swamped. Affiant then fought his way over to the left-hand side, further to the rear; had to fight his way through a crowd of sailors who were keeping every one back. As he got to the side of the vessel a man was standing there with an ax. A friend of affiant's who immediately preceded him was struck down, but affiant succeeded in overcoming the man with the ax and jumped over the side of the vessel, and that he was the last
31 one to get into the lifeboat, and was cut by the ax on his wrist.

The time he saw Mrs. Rhodes and her son last was just prior to his jumping over the side of the vessel. Affiant further states that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back; that he was the last one to get into the lifeboat, and at the time he got in he was the nineteenth man in the boat. They endeavored to throw him out of the boat, but they did not succeed.

Affiant further says that he is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away the ship went down with a lurch and every one on board was drowned; that

both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosened until after death, no one else saw them; that he has no interest in this case and his acquaintance with the parties was simply by reason of his attention being attracted to them and the fact that when he last saw them the mother and son were standing in the manner he has stated.

J. M. WILSON AND
A. A. HOEHLING, JR.,
Solicitors for Barbara Faul and Andrew Waesner.
J. W. SMITH AND
W. H. DENNIS,
Solicitors for J. L. French, Adm'r of Eugene Rhodes, Dec'd.
J. J. DARLINGTON,
JOHN B. LARNER,
Sol's for Def'dt Y. M. Christian Home.

32 *Stipulation to Hear Causes Together.*

Filed Jan. 22, 1900.

In the Supreme Court of the District of Columbia.

GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased, Complainants,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME, Barbara Faul and Andrew Waesner, and John L. French, Administrator of the Estate of Eugene Rhodes, Deceased, Defendants.
} In Equity. No. 18968. Bill of Interpleader.

and

JOHN L. FRENCH, Administrator, Complainant,
vs.
HULICK and LARNER, Administrators *c. t. a.*, Defendants.
} In Equity. No. 17291.

It is hereby stipulated and agreed that these two cases may be heard together.

J. M. WILSON,
A. A. HOEHLING, JR.,
Solicitors for Barbara Faul and Andrew Waesner.
J. W. SMITH AND
W. H. DENNIS,
Solicitors for J. L. French, Adm'r of Eugene Rhodes, Dec'd.
J. J. DARLINGTON,
JOHN B. LARNER,
Sol's for Y. M. C. Home.

December 2, 1899.

33 COMPLAINANTS' EXHIBIT No. 1.

Filed Feb. 27, 1900.

Last Will and Testament.

In the name of the bountiful Giver of all. Amen.

I, Sophia Rhodes, of the city of Hutchinson, in the State of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

I now dispose of the property and estate which it has pleased Almighty God to intrust to me, as follows, viz:

Imprimis. I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

Item 1. I give, devise and bequeath unto my husband Oliver Wheeler Rhodes, during his life one-half (½) of the income from all my properties and estate in the next following item of this last will and testament disposed of, to be paid over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

Item 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only

34 to the provisions of item 1 of this last will and testament.

Item 3. In the event of the death of my son, Eugene Rhodes,

(Three (3) pages—page 1.)

before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

2nd. All the rest and residue of my property, real personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with what-

soever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

Item 4. In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then, give, devise and bequeath all my property, real personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the
35–40 District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

(Three (3) pages, page 2.)

Lastly. I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament: and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor.

In testimony whereof, I, the said Sophia Rhodes, have hereunto set my hand and seal, at the city of Washington, in the District of Columbia, this tenth day of May, A. D. 1894.

SOPHIA RHODES. [SEAL.]

The foregoing last will and testament was signed, sealed, published, and declared by Sophia Rhodes, well known to each of us, as and for her last will and testament, in our presence, who, at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses this tenth day of May, A. D. 1894.

A. N. ROBINSON,
#326 *E Street N. E.*
A. C. GLANCY,
#326 *E Street N. E.*
LOUISE R. GLANCY,
#326 *E Street N. E.*

(Three (3) pages, page 3.)

* * * * * * *

41–43 Balance for distribution..... 14,891 89

Consisting of notes & interest.....	$11,194 44
Pictures & frames.....	250 00
Cash.....	3,447 45
	$14,891 89

GEO. W. HULICK,
JOHN B. LARNER, *Adm'rs.*

44 *Decree.*

Filed May 29, 1900.

In the Supreme Court of the District of Columbia.

GEO. W. HULICK ET AL., Adm'rs, *c. t. a.*, Estate of Sophia Rhodes,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME ET AL. } No. 18968. Equity.

This cause coming on to be heard upon the bill, the answers, and the stipulation between the parties in said cause, it is thereupon by the court, this 29th day of May, A. D. 1900, adjudged, ordered, and decreed that the defendant The Young Women's Christian Home is entitled, as devisee and legatee under will of Sophia Rhodes, to all the property, real, personal, and mixed, of whatsoever nature, kind, or description, of the said testatrix, and that the complainants, George W. Hulick and John B. Larner, administrators *cum testamento annexo* of said testatrix, account for and pay over to the said defendant, The Young Women's Christian Home, all assets of the said estate which have come or shall hereafter come into their hands as administrators as aforesaid.

It is further ordered that the costs of this cause and the costs of clerk and marshal & depositions in No. 17291 be paid out of the assets of the estate of said Sophia Rhodes by the administrators.

JOB BARNARD, *Justice.*

45 From this decree the defendants Barbara Faul and Andrew Waesner and John L. French, adm'r, in open court, severally pray an appeal to the Court of Appeals; which is allowed, and the appeal bond fixed at one hundred dollars.

JOB BARNARD, *Justice.*

Memorandum.

June 6, 1900.—Appeal bond filed.

Memorandum.

June 19, 1900.—Appeal bond of John L. French, adm'r, filed.

46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 45, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 18968, equity, wherein George W. Hulick *et al.* are com-

plainants and The Young Women's Christian Home *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 22d day of June, A. D. 1900.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

47 Court of Appeals of the District of Columbia.

BARBARA FAUL and ANDREW WASNER ET AL., Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators, etc., *et al.*, Appellees.
No. 1010.

The clerk in printing the transcript of record in the above-entitled cause will please omit the following portions thereof:

Certificate of E. R. Monfort, clerk, on page 14.

Certificate of H. A. Rice, clerk, on page 15.

All of pages 36, 37, 38, and 39.

All of page 40.

All of page 41 except the words "Balance for distribution, $14,891.89," and last four lines on page.

All of pages 42 and 43.

J. M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Barbara Faul and Andrew Wasner, Appellants.

Assignment of Errors.

The assignment of errors of Barbara Faul and Andrew Wasner, parties appellant.

The court erred as follows:

1. In holding and deciding that in construing the will of Sophia Rhodes, deceased, it is permissible to add to such will and to insert therein a condition and contingency not therein provided for by the testatrix, and in giving effect to the will as so altered and its terms and provisions so enlarged, as herein stated.

2. In holding and deciding that the heirs-at-law and next of kin of said decedent can be disinherited without express devise and the estate of said decedent diverted from such heirs-at-law and
48 next of kin to a stranger in blood, The Young Women's Christian Home, a corporation, party appellee herein.

3. In failing to hold and decide that the said Sophia Rhodes died intestate, and that her property and estate descended to these appellants as her only heirs-at-law and next of kin.

4. In holding and deciding that the moneys and property in the hands of the complainants in interpleader herein should be paid to the legatee named in the will, to wit, to the home aforesaid, and this

notwithstanding the fact that such devise was one upon and express condition and contingency, therein named, and which condition and contingency did not happen.

5. In failing to hold and decide that the devise to the said home in said will contained was one upon an express condition and contingency, and that such condition and contingency did not happen.

6. In failing to hold and decide that these appellants, as such heirs-at-law and next of kin of said decedent, are entitled to the moneys and property of decedent so embraced in said bill of interpleader.

7. The court further erred in entering a decree herein awarding to the said home, party appellee herein, all the moneys, property, and estate of said decedent, such decree being beyond the power and jurisdiction of the court, because (*a*) not embraced in said bill of interpleader, except as to certain moneys and evidences of indebtedness in the hands of said complainants in interpleader; (*b*) certain property of decedent consists of real estate situate outside of the jurisdiction of said court and over which it had no control or jurisdiction, the same being governed by the laws of the place where so situate and not otherwise, and because (*c*), the same not being properly involved in this case, the court had jurisdiction neither of said subject-matter nor of the parties, and as to which the latter are entitled to their day in court.

8. Other errors appearing in the record and decree herein.

J. M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Barbara Faul and Andrew Wasner, Parties Appellant.

49 (Endorsed:) No. 1010. Court of Appeals D. C., April term, 1900. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Appellants' (Faul & Wasner) assignment of errors and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Jul- 24, 1900. Robert Willett, clerk.

50 In the Court of Appeals of the District of Columbia.

BARBARA FAUL and ANDREW WAESNER ET AL., Appellants, *vs.* GEORGE W. HULICK and JOHN B. LARNER, Adm'rs, etc., *et al.*	No. 1010.

On appeal from the supreme court of the District of Columbia.

Assignment of Errors on the Part of John L. French, Administrator, Party Appellant.

The court erred as follows:

1. In deciding that the evidence was insufficient to show that the son of the said Sophia Rhodes survived his mother.

2. In failing to decide that as the law presumed in favor of no one of the three happenings possible (that the son, the mother, or neither, survived the other), election among them was to be made upon the evidence obtainable, and that the preponderance of that evidence was in favor of the son's survival.

3. In failing to decide that the burden of proof lay on the other defendants below to show that the testatrix's son, who, the last known of him, was her nearest relative and the beneficiary preferred by her will, had ceased to exist at the time of her death.

4. In deciding that the law presumes either that the testatrix survived her son or that he and she died on the very same instant.

5. In not deciding that (*a*) as between said home, as legatee, the testatrix's next of kin (if not her son, then her brother and sister), the law presumes that her property devolved at her death on her next of kin, and therefore put the burden of proof on the home to show that that contingency actually took place upon which the will diverted said property from such next of kin to said home, and that (*b*) as to which was testatrix's next of kin at time of her death—her son or her brother and sister—the burden of proof lay on
51 latter to show that the son's life, standing in kin between them and testatrix the last that was known of it, had passed therefrom at time of her death, leaving them next to her in kin.

6. In deciding that according to the law of this District "the heirs-at-law and next of kin of Mrs. Sophia Rhodes, *who are known to have survived her*, would take her estate in the absence of any valid testamentary disposition by her."

7. In deciding that it was judicially and metaphysically possible, in the absence of proof of the simultaneous death of testatrix and her son, to dispose of her property on the theory that said two deaths were simultaneous *without* "presuming" that they were.

8. In construing testatrix's will as passing her property to the said home without first finding as a fact that one or the other did happen of the only two contingencies under which the will could have had that effect, viz., that her son predeceased her, or that he and she died on the same instant.

9. In deciding that the will passed the property to the home, appellee, in the event of its being unascertainable whether the two deaths in question took place on the same instant or not.

10. Even assuming that the said Sophia Rhodes died completely testate, the court below erred in putting the burden of proof on the part of the preferred legatee, the son, instead of on the deferred and substituted legatee, the home, to prove the fact on which their respective claims rested.

11. The original bill of complaint herein did not extend to real estate in Kansas and Colorado that said Sophia Rhodes died seized and possessed of, nor did it make her son's paternal heirs-at-law parties to this suit, and therefore the decree entered below contains error in that it assumes to award to the said home, appellee herein, *all* the

money, property, and *estate*, wherever situated, of the said Sophia Rhodes.

J. W. SMITH,
WM. HENRY DENNIS,
Attorneys for John L. French, Adm'r, Party Appellant.

52 (Endorsed:) No. 1010. Court of Appeals D. C., April term, 1900. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Assignment of errors on part of John L. French, adm'r, party appellant. Court of Appeals, District of Columbia. Filed Aug. 3, 1900. Robert Willett, clerk.

53 In the Court of Appeals of the District of Columbia.

BARBARA FAUL ET AL., Appellants,
vs.
THE YOUNG WOMEN'S CHRISTIAN HOME *et al.*, Appellees. } No. 1010.

Stipulation of Counsel.

It is hereby stipulated and agreed by and between counsel for the appellants and appellees, respectively, that the printed copy of opinion of Mr. Justice Barnard, heretofore rendered in the above-entitled cause and hereto attached, may be attached to the record on appeal now on file in this court, and printed, together with this stipulation, as a part of the record in said cause.

J. W. SMITH,
J. M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Appellants.
J. J. DARLINGTON,
Attorney for Appellees.

54 *Opinion.*

Supreme Court of the District of Columbia.

JOHN L. FRENCH, Adm'r, etc.,)
v.
GEO. W. HULICK ET AL., Adm'rs *c. t. a.*)

GEO. W. HULICK ET AL., Adm'rs *c. t. a.*,)
v.
THE YOUNG WOMEN'S CHRISTIAN HOME ET AL.)

In equity. Nos. 17291 and 18968. Decided May 28, 1900.

Hearing on bill in equity to require defendants to pay over to complainant an alleged trust fund, and on a bill of interpleader, the two cases being heard together.

Mr. J. W. Smith and *Mr. W. H. Dennis* for French *et al.*
Mr. A. A. Hochling, Jr., for Faul *et al.*
Mr. J. J. Darlington and *Mr. John B. Larner* for Hulick *et al.*

Mr. Justice BARNARD delivered the opinion of the court:

The bill in the first of these cases was filed April 9, 1896, and in the second case, January 19, 1898, and the two cases were heard together by agreement of counsel.

The bill in No. 17291 asks that the defendants be decreed to pay over to the complainant the funds held by them, claiming $1,000 to be a trust fund which said Sophia Rhodes, mother of said Eugene Rhodes, held for him; and claiming the balance received by defendants as arising from estate of Oliver W. Rhodes, the father of complainant's intestate.

In No. 18968, the bill is in the nature of a bill of interpleader, the administrators *c. t. a.* of Sophia Rhodes asking that the estate of Eugene Rhodes, and the Young Women's Christian Home, as legatee of Mrs. Sophia Rhodes, and Barbara Faul and Andrew Wasner, her brother and sister, as next of kin, interplead among themselves, and establish their claims to the fund by complainants.

55 By stipulation filed in the case the following facts appear: Oliver Wheeler Rhodes departed this life in this District, January 27, 1895, at which time his wife, said Sophia Rhodes, and their only child, said Eugene Rhodes, were in Heidelberg, Germany. They were starting home, when they received a cablegram announcing his death; and they sailed from Bremen on the steamer "Elbe" at 3 o'clock, p. m., on Tuesday, January 29, 1895. About half past five o'clock the next morning, when about due west from The Hague, the steamer collided with another steamer, the "Craithie," going from Rotterdam to Scotland, the "Elbe" being struck on the same side and about eight feet abaft of the state-room occupied by mother and son, and sank in about twenty minutes after the collision. Six

weeks afterwards, March 6, 1895, the body of said Eugene Rhodes came up in a fishing net off the coast of Holland, but his mother's body was never recovered. She was about 52 years old, corpulent and short-winded in breathing; and her son was about 23 years old, a single man, and was rather a good swimmer. He died intestate, and his next of kin, in case he survived his mother, were his uncle and aunt on his mother's side, Andrew Wasner and Barbara Faul, and uncles and aunt on his father's side, John G. Rhodes, Melville D. Rhodes and Mrs. Alice Fitch; said John G. Rhodes has since died, leaving a widow and five children surviving. In case Mrs. Sophia Rhodes had survived her said son, her next of kin were her said brother and sister, the defendants, Andrew Wasner and Barbara Faul.

Of the twenty-one persons who survived the said shipwreck, only two have any knowledge of the said mother and son at the time of the disaster. One of these, Anna Bocker, saw Mrs. Rhodes come out of her cabin just after the collision, with a blanket over her night dress, and some minutes later said Anna Bocker saw said Eugene Rhodes just in front of her as she went on deck, and she never saw either of them afterwards. The other, John Vevera, of Cleveland, Ohio, real-estate agent, and formerly a county commissioner, on the night preceding the disaster, sat at the same table with the mother and son; and next day, after the collision, when every one was on deck, he saw them on the left side of the boat, the son endeavoring to put a shawl around his mother, and she with her arms thrown around her son's neck. This witness was the last one to get into the lifeboat, and that was the last to leave the ship; and when it had gotten some distance away, the ship went down with a lurch, and every one on board was drowned.

The complainants in No. 18968 file a copy of their first account as administrators *c. t. a.* of the estate of said Sophia Rhodes, which shows a balance in their hands for distribution of $14,891.98; and the court is asked to decide who is entitled to receive this estate.

Before undertaking to answer this question, I will state, that in my opinion, the complainant in said first cause, No. 17291, has failed to produce sufficient evidence to impress a trust in favor of said Eugene Rhodes, upon any portion of this fund, and failed also to satisfy my mind that any part of said fund legally belongs to the estate of Oliver W. Rhodes. I will, therefore, consider it to belong to the said Sophia Rhodes at the time of her decease, and subject to be disposed of by her will, if she left a will that can be held operative under the circumstances of this case.

Counsel representing the parties claiming this fund, have been most exhaustive in their researches, and have aided the court very much by their interesting arguments and able briefs. From a careful study of the various authorities cited, I am of the opinion that there is no presumption which the court can bring to its aid in a case like this, by which to determine who is the survivor of two persons who are lost in a common disaster, such as the wreck of a ship, and the drowning of all who are on board at the time the

vessel sinks into the sea. If there is no proof to show who survives, the rule seems to be this, that property belonging to either of them must be disposed of by will, or the laws of descent and distribution, as if they both died at the same time. There is no presumption that either survived the other, and no presumption that they died at the same moment, but as the order of their death cannot be shown, some plan must be decided upon in the absence of any definite proof, for the succession to their estates; and, so the courts say they will act as if there was proof or presumption that their deaths occurred at the same time, and that neither one survived the other. Cowman *v.* Rogers, 73 Md., 403; Johnson *v.* Merriwether, 80 Me., 111.

Adopting this principle, the conclusion would seem to follow that the heirs-at-law and next of kin of Mrs. Sophia Rhodes who are known to have survived her, would take her estate in the absence of any valid testamentary disposition by her. She left a will, however, executed on the 10th day of May, 1894, which has been duly admitted to probate in this court holding a special term for orphans' court business, and her administrators *c. t. a.* now have her estate in hand by virtue of said will. The first question, therefore, is, does the will dispose of the property left by Mrs. Rhodes?

In order to gather the meaning of this will, and to ascertain, if possible, what the real intention of the testatrix was in executing it, I will read it in full, except the formal words at the beginning and ending:

"I, Sophia Rhodes, of the city of Hutchinson, in the State of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

"I now dispose of the property and estate which it has pleased Almighty God to entrust to me, as follows, viz:

"*Imprimis:* I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

"Item 1: I give, devise and bequeath unto my husband, Oliver Wheeler Rhodes, during his life, one-half ($\frac{1}{2}$) of the income from all my properties and estate in the next following item of this
56 last will and testament disposed of, to be paid over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

"Item 2: I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"Item 3: In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give,

devise and bequeath all my property, everything I own on earth, as follows, viz:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"Item 4. In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st of item 3, of this last will and testament.

"Lastly: I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this, my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

It seems to me that any one reading this will for the first time, would gain some general idea of what the testatrix wished to have understood by the language used, such as this, briefly speaking:

She wished to dispose of her entire estate; to provide for her husband by securing to him an income only; to confide in, and provide for her son by leaving him the estate absolutely, subject only to the husband's income for life; and to make him her executor and trustee. Then it seems to have occurred to her that her son might die; in that event, she changes the provision for her husband, for his life, and leaves the estate to the Young Women's Christian Home at his death. Then, as if struck with another idea, that her son and husband might both die, she provides in that case that the estate go at once to said charitable institution.

She says, in the fourth item: "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes," the property is to go to the home; but what she intends by these words, taking the whole will together, might be more accurately expressed in this form: "In the event that neither

my husband nor my son shall survive me," then the whole estate to vest in the home. The possibility of death occurring to all three or to any two of them at the same moment was so remote that she never thought of that contingency, or of any consequence to follow it. She only had three persons in mind as the objects of her bounty, her husband, her son, and said home; and she supposed she had covered every contingency by the careful wording used; for if her husband and son could not live to receive the estate, the home, being a corporation, and therefore in no danger of death, would be sure to receive it. What she appears to have been anxious to guard against was the lapsing of the legacies to her husband and son, in the event of the death of either before her death.

If the words of the fourth item are read by themselves, and given their literal meaning, it must be held that the contingency therein named has not been shown to have happened; and, therefore, her bequest to the home would fail; but no such intent can be inferred, if you look at the whole will, and the situation of the testatrix when the will was executed, as shown by the testimony—an improvident husband, for whom she had an affectionate solicitude; an educated, careful, trustworthy young son; an apparently warm interest in a charity in which she wished her name to be remembered.

Such, evidently, being the meaning naturally to be gathered from the whole will and the surrounding circumstances, are the established rules of construction broad enough to enable the court to properly and legally read the paper as if she had supplied the other alternative thus: "or in the event that my husband and son die at the same time with me," then to the home; or better still, "in the event that my husband and son do not survive me," then to the home.

Chief Justice Marshall, in delivering the opinion of the court in the case of Finlay *v.* King's Lessee, 3 Peters, 376, uses the following language: "The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although, in giving effect to it some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentence."

The court is authorized to occupy the same standpoint as that of the testator, in order to discover from a view of all the circumstances as they existed when the will was made, what the
57 testator intended to be understood by the words used by him. Lee *v.* Simpson, 134 U. S., 572. When this intention is ascertained it will prevail when not inconsistent with rules of law. Colton *v.* Colton, 127 U. S., 300.

In the case of Clark *v.* Boorman's Executors, 18 Wall., 502, Justice Miller used this language: "Very few classes of questions are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases, could meet and solve these difficulties, there would remain no cause of complaint

on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. * * * Unfortunately, however, these authorities are often conflicting, or arise out of forms of expression so near alike, yet varying in such minute shades of meaning, and are decided on facts or circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled. To these considerations it is to be added that of all legal instruments, wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

If we read this will of Mrs. Rhodes, can we gain any impression from it by any words therein, that she intended, under any contingency whatever, to die intestate? If she did die intestate, it would seem to be directly the opposite of what she intended. The estate was under her control and dominion while she lived, and what she evidently meant by her will, taken as a whole, was this: That if her husband and son could not survive her so as to have the use and benefit of the property, and the same remained under her control at the time of her death, when the will speaks, then it should go absolutely to the charity she had named. Robinson *v.* Portland Orphan Asylum, 123 U. S., 702; Aulick *v.* Wallace, 12 Bush., 531; Doe Dem. Leach *v.* Micklen, 6 East., 486; Metcalf *v.* Framingham Parish, 128 Mass., 370.

Having been unable to find that Mrs. Rhodes died intestate, there is no necessity to determine who would succeed to her estate in that event, and I need not, therefore, prolong this opinion.

I will sign a decree awarding the property in the hands of the complainants in No. 18968 to the legatee named in the will, and dismissing the bill in No. 17291.

58 [Endorsed:] Court of Appeals D. C., April term, 1900. No. 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Addition to record per stipulation of counsel. (Opinion of court.) Court of Appeals, District of Columbia. Filed Oct. 1, 1900. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Court of Appeals, District of Columbia. Filed Jul- 23, 1900. Robert Willett, clerk.

THURSDAY, *January* 17*th*, A. *D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants.
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
No. 1010.

The argument in the above-entitled cause was commenced by Mr. A. A. Hoehling, Jr., attorney for the appellants Barbara Faul and Andrew Wasner, and was continued by Mr. Wm. H. Dennis, attorney for the appellant John L. French, administrator, and by Mr. J. J. Darlington, attorney for the appellees, and by Mr. J. W. Smith, attorney for the appellant, John L. French, administrator.

FRIDAY, *January* 18*th*, A. *D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants.
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
No. 1010.

The argument in the above-entitled cause was concluded by Mr. J. W. Smith, attorney for the appellant John L. French, administrator.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants.
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
No. 1010.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

This case began with a bill of interpleader filed by the administrators, with the will annexed, of the estate of Sophia Rhodes, deceased. After the payment of all claims there remained in the hands of the administrators a fund of $14,891.89 for distribution. Of this there were three sets of claimants, namely, the Young Women's Christian Home, a corporation of the District created by act of Congress; the next of kin of said Sophia Rhodes; and the administrator of the estate of Eugene Rhodes, deceased.

The will of Sophia Rhodes, after providing for the payment of debts, etc., and for an income for her husband Oliver Wheeler Rhodes, contained the following items:

"Item 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed,

of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"Item 3. In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"Item 4. In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes and of my son, Eugene Rhodes, I then, give, devise and bequeath all my property, real personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

"Lastly, I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

The case was submitted on the hearing below upon an agreed statement of facts, from which it appears:

1. That Eugene Rhodes was the only child or descendant of Sophia Rhodes and Oliver W. Rhodes, and John L. French is the duly appointed administrator of his estate.

"2. That the said Oliver Wheeler Rhodes departed this life in the District of Columbia on the 27th day of January, 1895; that his said wife and son were at that time in Heidelberg, Germany; that, being advised of his extreme illness, they started for Bremen to take the next steamer home, receiving a cablegram announcing his death a few hours before they sailed; that they sailed on the steamer 'Elbe' at 3 o'clock p. m., on Tuesday, January 29th, 1895

both occupying the same state-room; that about 5.30 o'clock the next morning, as the ship was going in a southwesterly direction and was about due west of The Hague, she collided with the steamer 'Craithie,' en route northwesterly from Rotterdam to Scotland, the point of penetration being on the same side and deck of the 'Elbe' and about 8 feet abaft of the room occupied by the said testatrix and her son. In about 20 minutes thereafter the 'Elbe' went down. One life-boat, No. 3, got away with twenty-one survivors. Life-boat No. 5, filled mostly with women, capsized on being lowered to the water and all of its occupants were lost except one Anna Bocker, hereinafter referred to, who succeeded in getting into boat No. 3. Six weeks thereafter, March 6, 1895, the said Eugene's body came up in a fishing net off the coast of Holland; the mother's body was never recovered.

"3. The testatrix was about 52 years of age at the time of her death, was corpulent of figure, and short-winded in breathing. Her son was about 23 years old, was rather a good swimmer, had never been married, and he died intestate.

"4. The said Sophia Rhodes' next of kin, if she survived her said son, were and are her brother and sister, Andrew Waesner and Barbara Faul, defendants herein. If her said son survived her his next of kin were said Andrew Waesner and Barbara Faul, on his mother's side, and on his father's side John G. Rhodes, Melville D. Rhodes, and Mrs. Alice Fitch, brothers and sisters of his father. The said John G. Rhodes has since died, leaving a widow, Katherine Rhodes, of Georgetown, Ohio, and five children, viz., Mrs. Mary R. Story, of Cincinnati, Ohio; Mrs. Belle R. Latham, Burlington, Iowa; Miss Genevieve Rhodes, Cincinnati, Ohio; White Rhodes, Georgetown, Ohio, and John Rhodes, Nashville, Tennessee.

"5. That of the twenty-one persons known to have survived said shipwreck two only, Miss Anna Bocker and John Vevera, have any personal knowledge tending to show the respective movements and situation of the said Sophia Rhodes and Eugene Rhodes, her son, at the time of the disaster aforesaid and immediately preceding their death; and it is further agreed that said Anna Bocker, if produced as a witness on behalf of the defendant John L. French, would testify, and the following is to be taken as her deposition to the effect, that just after the collision she saw the testatrix come out of her cabin, clothed in a blanket over her night-dress, as if to see what the matter was, and that she, the witness, never saw the said Mrs. Rhodes afterwards; that subsequently (certainly some minutes after) when she, Miss Bocker, went on deck she saw the said Eugene Rhodes just in front of her, and never saw him afterwards, and that the said John Vevera, if produced as a witness in behalf of said Waesner and Faul, would testify, and the following is to be taken as his deposition to that effect, that he is a resident of the city of Cleveland, county of Cuyahoga, Ohio, residing at 339 Burton street; that he has lived in said city for 26 years last past; that from 1893 to 1896 he was a member of the board of county commissioners of Cuyahoga county, Ohio; that since the first day of January, 1896, he has been and now is in the real-estate and insurance business in the city of Cleveland; that he was in Europe in the latter part of 1894 and took pas-

sage to return to this country on the steamship 'Elbe;' that on the night preceding the disaster to this ship he sat at the same table with a mother and son; that his attention was attracted to them, as they seemed so happy and as the mother seemed so much interested in the boy, and that shortly thereafter he learned that the name of the woman was Mrs. Sophia Rhodes, and that the young man was her son; that after the accident which occurred on January 30, 1895, when every one was on the deck, he saw these parties on the left side of the boat. The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold.

"When affiant first came on the deck he went to the life-boat on the right-hand side of the vessel, but found it filled with ladies, and no man was allowed to enter the boat, but after it left the vessel a short distance it was swamped. Affiant then fought his way over to the left-hand side, further to the rear; had to fight his way through a crowd of sailors who were keeping every one back. As he got to the side of the vessel a man was standing there with an ax. A friend of affiant's who immediately preceded him was struck down, but affiant succeeded in overcoming the man with the ax and jumped over the side of the vessel, and that he was the last one to get into the life-boat, and was cut by the ax on his wrist.

"The time he saw Mrs. Rhodes and her son last was just prior to his jumping over the side of the vessel. Affiant further states that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back; that he was the last one to get into the life-boat, and at the time he got in he was the nineteenth man in the boat. They endeavored to throw him out of the boat, but they did not succeed.

"Affiant further says that he is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away the ship went down with a lurch and every one on board was drowned; that both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosed until after death, no one else saw them; that he has no interest in this case and his acquaintance with the parties was simply by reason of his attention being attracted to them and the fact that when he last saw them the mother and son were standing in the manner he has stated."

Upon the foregoing facts it was decreed that the Young Women's Christian Home was entitled to the fund, and it was ordered to be paid over accordingly. From that decree all of the other parties have appealed.

1. All that is certainly shown in the evidence agreed upon by the parties is, that the testatrix, Sophia Rhodes, and her son Eugene perished in the same disaster. There is no evidence upon which to base a judicial opinion that either survived the other; and in ad-

judicating the rights of those claiming under either of them the order of their deaths must be considered as judicially unascertainable.

Unlike the Roman law, and the modern laws of some countries and states derived or adopted therefrom, the common law indulges no presumption of survivorship, whatever may have been the age, sex, or physical condition of the respective persons proved to have lost their lives in a common disaster. It requires evidence as the basis of its action.

It would prove a useless consumption of time to review the older cases in England involving this question; for whatever doubt may have existed by reason of certain expressions used in some of them, has been finally set at rest by the decisions in two noted cases—one by the lord chancelior with the aid of two common-law judges, and the other by the House of Lords. Underwood *v.* Wing, 4 De G. M. & G. 633; Wing *v.* Angrave, 8 H. L. C. 183.

The American courts before which the question has come, have enounced the same doctrine substantially. Coye *v.* Leach, 8 Mete. 371; Newell *v.* Nicholls, 75 N. Y. 78; Cowman *v.* Rodgers, 73 Md. 403; Russell *v.* Hallett, 23 Kan. 276; Johnson *v.* Merriwether, 80 Me. 111; Estate of Ehle, 73 Wis. 445; Smith *v.* Armistead, 7 Fla. 81; Paden *v.* Briscoe, 81 Tex. 563.

2. Admitting the rule of the common law as stated and assuming that the order of death of mother and son in this case is unascertainable from the evidence, it has been contended that the property rights of those who claim under each decedent must be determined as if death occurred to each at the same instant. This view seems to have support in the language used in the opinions delivered in some of the American cases above cited, but we cannot accept it as logical and sound. It seems to us nothing less, in reality, than the substitution of one presumption for another—the, if anything, more unreasonable presumption of simultaneous death, for the rejected presumption of survivorship. Presumptions failing, the law requires evidence as a foundation for action upon either hypothesis. On application to the courts, there is always a burden of proof, slight though it may often be, upon him who has the affirmative, and if he fails to discharge it with evidence reasonably sufficient for the purpose, he must suffer the consequences of failure. His opponent succeeds, not upon proof of his own case or defense, but by reason of the absence of evidence on the necessary point.

In our opinion, therefore, the distribution of the personal estate of which Mrs. Sophia Rhodes was possessed at the time of her death must depend upon the ascertainment of the party whose position in the case is such that he must succeed because of the failure of evidence to establish the essential fact of survivorship.

3. The claim of the Young Women's Christian Home will first be considered.

If the will is to be construed as making the death of Eugene Rhodes, in the lifetime of his mother, a condition precedent to the taking effect of the bequest over, then it is quite clear that the burden of proving that fact is thrown upon the legatee and has not been discharged.

The question now occurs, and it is to it that the weight of the argument has been directed: Whether the will is to be so construed? The contention on behalf of the legatee is, substantially, that the obvious intention of the testatrix was to avoid intestacy absolutely, and that the home should take her estate not only upon the event expressly provided for, but also in case, as here shown, where her son, who was the first object of her bounty, could not possibly survive to take any practical benefit.

The argument in support of this contention prevailed with the learned justice who presided at the hearing and determined the decree rendered. It was conceded by him, as his opinion in the record shows, that, giving the words of the fourth item "their literal meaning, it must be held that the contingency therein named has not been shown to have happened." But he was of the opinion that the general intention of the testatrix that the home should have the benefit of her estate, if her husband and son were not able to take beneficially, was so apparent, the will must be construed as if either of the following clauses had been inserted therein by the testatrix: "Or in the event that my husband and son die at the same time with me," "or in the event that my husband and son do not survive me."

We are constrained to differ from this conclusion. It is undoubtedly true, that "the intent of the testator is the cardinal rule in the construction of wills;" but this intention must be found in the language of the will itself. Where such general intention is found, considerable latitude has been permitted in the way of rejecting the literal meaning of some words when irreconcilable with the context, and even in supplying words to give effect to this general intention, where it is plain that the testator has incompletely expressed his apparent meaning, and it is also plain what those words are which he must have meant to use, and yet, through negligence or ignorance, omitted. In such cases the construction is founded on the apparent condition of a contingency, or state of circumstances, present in the mind of the testator at the time, and which he has imperfectly described or provided for. But when the testator has evidently overlooked, or failed to apprehend, a particular contingency which might occur and change the course which his estate would otherwise take, the courts are not at liberty to read into the will a clause providing for that contingency, although they might believe generally that the testator would have inserted it had attention been called to it when the will was written and executed.

This very question was involved in the case of Wing *v.* Underwood, 4 De G. M. & G., 633, 654, and after careful consideration the decision was against the construction contended for. The condition upon which the bequest to Wing depended was: "And in case my wife shall die in my lifetime, then," etc. Husband and wife perished in the same shipwreck and there was no proof of survivorship. Lord Chancellor Cranworth, in disposing of the question, said:

"The gift to Mr. Wing is in terms made dependent and was evidently meant to be dependent, on the single event, sitting aside the children, of the testator surviving his wife: If she should survive,

he gives everything to her, if she dies in his lifetime he gives everything to Mr. Wing; it is impossible to say that there is any third case, or class of cases, to which the language of the will could possibly be applicable. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property; but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object.

"It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing; the answer is, he has not said so, neither expressly nor impliedly; and if I were to attempt to supply the omission I feel that I should be making, not construing the testator's will."

The same question was later considered in the House of Lords in the case arising under the will of Mrs. Underwood, which gave her property to Wing also, in case her husband should die in her lifetime, and the same decision followed. Wing v. Angrave, 8 H. L. C., 183, 207, 215, 223. In giving his opinion Lord Wensleydale said:

"No one can doubt as to the testatrix's 'intention,' in the loose sense of that word. No one can suppose that she really meant not to give the property to Wing, if her husband and herself should happen to die at the same moment. No one doubts that, had she thought of such a possibility at the time she made her will, she would have provided for it by express words. But it cannot be too often repeated, that the true question in all these cases is, not what the testatrix intended to do, but what is the meaning of the words used in the will."

In the same case Lord Chelmsford used the following language which seems to us directly applicable to the conditions of the case at bar:

"In forming my judgment in this case, I have had to struggle with my strong inclination so to construe the will as to give the appellant the benefit under it, of which he has been deprived by a singular and unforeseen accident. I would gladly have found anything which either expressly or by necessary implication manifested any intention that he should take at all events upon the failure of the gift to Mr. Underwood.

"But it must be conceded, that the event which has happened was so extraordinary and improbable, that it was not likely to have occurred to the mind of any one, and therefore no provision for it could have been contemplated. We may, indeed, speculate with great probability, if not with certainty, as to what the form of bequest would have been, if the possibility of such event had been suggested; but to act upon such a speculation would be to make the will speak a different language for the purpose of satisfying an intention which could not have been conceived, and, therefore, could never have been meant to be expressed."

Another omission of this will tends to illustrate the impropriety of giving it — construction founded upon what has been aptly called,

"the testatrix's 'intention' in the loose sense of that word." No provision is made for the contingency of Eugene Rhode's death leaving issue. Consequently, upon the construction contended for, if he had married and left a child surviving him, that child would be cut out. This contingency, far more likely of apprehension than the one that did happen, was no more present in the mind of the testatrix than was the other. And there is nothing in the will or the circumstances surrounding the parties, that would justify any other conception than, that had it occurred to her she would have provided for it by apt words for the purpose.

The case of Newell *v.* Nicholls, 75 N. Y., 78, which is the authority most strongly relied on by the appellee, appears to us to be distinguishable.

The will vested the entire estate in trustees for the purpose of raising certain specified funds. The interest upon one fund was directed to be paid to a daughter during her life, with remainder to the heirs of her body if then living. In default of heirs of her body living at the time of her death, she had the power to appoint by will to whom she pleased. In default of said heirs living at the time of her death, or of the exercise of the power, the remainder was to the heirs of the body of the testatrix, then living, and in default of these, over to the heirs of Frederick Ridgway and others. A like fund was to be raised for the benefit of her son upon corresponding limitations. A third fund was to be raised for the benefit of her husband during his life, with remainder to the heirs of testatrix's body then living, and in default of such heirs living at the time of her death then over to Ridgway and others also. After the death of testatrix, her husband and mother, and the two children who were under the age of ten years, were lost in the wreck of the steamship Schiller, and there was no evidence from which survivorship could be ascertained. It was held, that the property had never vested in the children under the will, but the title had remained in the trustees until their death—the trust being valid and active, title was necessary to its execution; that the remainder over was a conditional limitation and not a condition precedent; and that the intent of the will was that it should be effectual if for any reason the children could not take. Following Wing *v.* Angrave, in respect of the doctrine of presumption, it was held that the appellants, who claimed under the two children, were charged with the burden of proving their title to some specific share or interest, and were not aided by their alternative claims. it was said by Chief Justice Church, who delivered the opinion of the court: "As to the daughter's share there was a failure to prove a title because it does not appear that the son survived the daughter, and the same is true of the share of the son."

The court also, incidentally, recognizes the distinction between the will of Mrs. Ridgway and that of Mrs. Underwood, by agreeing that the survivorship of the latter was a condition precedent to the taking of an interest by Wing.

In the next case relied on, the will is very different from the one under consideration. Robinson *v.* Portland Orphan Asylum, 123

U. S. 702. From the terms of the will in that case, it was plain that the widow of the testator was intended to take an interest for life and nothing more, and that the testator wished to avoid intestacy in any event. But no distinct words were read into the will to effectuate the aforesaid intention. The words, "at their death," which described the commencement of the gift over to the defendants, were reconciled with this plain intention, by taking them as indicating only the expectation of the testator, which he naturally indulged, that the beneficiaries named would not live to receive the gift intended, and not as requiring that the gift shall take effect at that time irrespective of the prior decease of the widow.

The final conclusion was stated as follows: "The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleanora C. Robinson, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants."

4. Having disposed of the claim of the Young Woman's Christian Home, the next question for consideration is: Upon whom lies the burden of proof as between the next of kin of Sophia Rhodes and the administrator of Eugene Rhodes?

One contention is, that the *prima facie* right is in the next of kin of the mother, whose estate is to be distributed, and that the burden of proof rests upon the representative of the son to displace them by showing his survival. This proposition has support in a number of decisions, some of which seem to be directly in point, while others are more or less analagous. Coye *v.* Leach, 8 Mete. 371; Johnson *v.* Merriwether, 80 Me. 111; Russel *v.* Hallett, 23 Kan. 276; *In re* Evans' Settlement, L. R. 1 Eq. 288; *In re* Phene's Trust, L. R. 5 Ch. App. 139.

On the other hand, the contention is, that upon the death of the mother descent was immediately cast upon the son, and, therefore, the burden lies upon the next of kin of the mother to show the prior decease of the son; in other words, that it is incumbent upon them to show the extinction of the intervening, preferential right of the son's representatives.

The argument in support of this contention, is founded upon the supposed analogy to the rule that prevails, in this jurisdiction, in actions of ejectment, which is: That the burden is upon the plaintiff to show not only his descent from some common ancestor with the person last legally seised, but also the extinction of all lines of descent that could take in preference. Posey *v.* Hanson, 10 App. D. C. 496, 505, and cases cited. See, also, Skinner *v.* Fulton, 39 Ill. 485, 495; Emerson *v.* White, 29 N. H. 482, 492; Bates *v.* Schraeder 13 Johns. 260; Stinchfield *v.* Emerson, 52 Me. 465; Payne *v.* Payne, 29 Vt. 172; Anson *v.* Stein, 6 Iowa, 150, 152; Delaney *v.* Noble, 3 N. J. Eq. 441, 445. And the rule seems to be substantially the same where the action is to recover, or establish a claim to personal property. Schneider *v.* Piessner, 54 Ind. 524, 525; Gardner *v.* Kelso, 80 Ala. 497, 501; 2 Woerner Law Admn. p. 1234; Underwood *v.* Wing,

4 De G. M. & G. 633, 655, 659. In the last case it was said: "The next of kin stands as to personalty in the same position as the heir-at-law as to realty and the person claiming against him must make out his entire title.

"In the absence of any effectual disposition of the beneficial interest in personalty, the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title, and to rebut the *prima facie* case of the next of kin."

The foregoing, however, is to be taken in connection with the fact that the proof in that case showed the survival, for a brief space, of a child of Mr. Underwood; and that fact made a *prima facie* case for the representative of the child, which Wing was under the burden of overcoming by proving the existence of the condition upon which his title as legatee depended.

Nevertheless, the settled rule of law, as stated, governing the devolution of an estate as the legal consequence of the decease of its owner, would seem to furnish a strong foundation for the contention of the representative of the son in the case at bar.

At the same time it is evident that, whilst the cases last cited satisfactorily determine where the burden of proof lies and what is necessary to discharge its obligation, in cases where the plaintiff sues to recover the possession of property held by another under claim of title, and not as a mere trespasser or wrong-doer, none of them included in its decision the very question of this controversy: In whom vested the *prima facie* right upon proof of the death of the mother, regardless of the fact that the same evidence showed the death of the son in the same shipwreck? In other words, did the mother's next of kin take subject to displacement by proof of the son's survival? Or, did the son's next of kin succeed, subject to displacement by proof of the mother's survival?

Laboring under some divergency of opinion, we would have great difficulty in determining upon which of these parties the burden of proof lies, had Sophie Rhodes left no will. But as there is a will under which her estate has been so far administered, to which we may look for a solution of the difficulty, and we are agreed upon the relations of the parties created thereby, we prefer to base our conclusions upon its provisions.

5. The husband of testatrix, having died before her, it will be observed that item 2 of her will gives her entire estate absolutely to her son Eugene. Then follows item 3 containing the condition precedent to the bequest over for the benefit of the Young Women's Christian Home, and another for the husband's life, namely: "In the event of the death of my son Eugene Rhodes before the decease either of myself or of my husband, I then give," etc.

The condition is then repeated distinctly in the following form in item 4: "In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes, and of my son Eugene Rhodes, I then give, devise," etc.

The terms of the will, then, vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a *prima facie* right in the personal representatives of the son, and imposes

the burden upon her next of kin of displacing them by proof of his mother's survival.

Proof of that fact having failed, it follows that the representatives and next of kin of the son are entitled to the entire fund. The decree appealed from is therefore reversed, with costs to be paid out of the fund in controversy, and the cause will be remanded with direction to enter a decree in conformity with this opinion.

Reversed.

WEDNESDAY, *March 6th, A. D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. French, Administrator of Eugene Rhodes, Deceased, Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home.
} No. 1010, January Term, 1901.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court, in this cause, be, and the same is hereby, reversed; costs to be paid out of the fund in controversy; and that this cause be, and the same is hereby remanded to the said supreme court with direction to enter a decree in conformity with the opinion of this court.

Per MR. JUSTICE SHEPARD.

March 6, 1901.

Court of Appeals of the District of Columbia.

BARBARA FAUL ET AL.
vs.
GEORGE W. HULICK ET AL.
} No. 1010, January Term, 1901.

Now comes the appellee, The Young Women's Christian Home, and, showing to the court that the appellees George W. Hulick and John B. Larner, administrators, are without interest in the result of this cause, moves the court that it may be allowed an order of severance from its said co-appellees and an appeal on its own behalf from the decree of this court in the above cause.

J. J. DARLINGTON,
Sol. for Young Women's Christian Home.

We consent.
GEO. W. HULICK &
JOHN B. LARNER, *Adm'rs.*
By JOHN B. LARNER.

(Endorsed:) No. 1010. Court of Appeals of the District of Columbia. Motion of Young Women's Christian Home for leave to sever

from coappellees and prosecute appeal in its own behalf. Court of Appeals, District of Columbia. Filed Mar. 14, 1901. Robert Willett, clerk.

THURSDAY, *March 14th, A. D.* 1901.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home. } No. 1010.

On motion of Mr. J. J. Darlington of counsel for the appellee, The Young Women's Christian Home, it is now ordered by the court, that said appellee, be, and it is hereby, allowed an appeal to the Supreme Court of the United States, on giving bond to act as supersedeas in the sum of five thousand dollars. And it is further ordered by the court, that the said appellee, be, and it is hereby, allowed to sever from its co-appellees in this court, George W. Hulick and John B. Larner, administrators, *c. t. a.* of the estate of Sophia Rhodes, deceased, and prosecute said appeal in its own behalf.

BARBARA FAUL, ANDREW WASNER, and JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased, Appellants,
vs.
GEORGE W. HULICK and JOHN B. LARNER, Administrators *c. t. a.* of the Estate of Sophia Rhodes, Deceased; The Young Women's Christian Home. } No. 1010.

On motion of Mr. J. J. Darlington, in behalf of Mr. A. A. Hoehling, Jr., of counsel for the appellants Barbara Faul and Andrew Wasner, it is now here ordered by the court that said appellants, be, and they are hereby, allowed an appeal to the Supreme Court of the United States, on giving bond to act as supersedeas in the sum of five thousand dollars.

Know all men by these presents, that we, The Young Women's Christian Home, as principal, and The United States Fidelity and Guaranty Company, a corporation of Maryland, as surety, are held and firmly bound unto John L. French, administrator of Eugene Rhodes, deceased in the full and just sum of five thousand dollars to be paid to the said John L. French, administrator of Eugene Rhodes, deceased, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Barbara Faul, Andrew

Wasner, and John L. French administrator of Eugene Rhodes, deceased, appellants and George W. Hulick and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased: The Young Women's Christian Home, appellees a decree was rendered against the said The Young Women's Christian Home and the said The Young Women's Christian Home having obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said John L. French, administrator of Eugene Rhodes, deceased citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Young Women's Christian Home shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Young Women's Christian Home.]

YOUNG WOMEN'S CHRISTIAN HOME. [SEAL.]
By HELEN W. PAIRO, *Vice-Pres't.* [SEAL.]
CAROLINE HERRON, *Treas.* [SEAL.]

[Seal of U. S. Fidelity & Guaranty Company.]

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By J. S. SWORMSTEDT, *Attorney-in-Fact.* [SEAL.]

Sealed and delivered in the presence of—
JOHN B. LARNER.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Cancelled 25c. internal-revenue stamp.]

[Endorsed:] No. 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Supersedeas bond of Young Women's Christian Home on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Mar. 19, 1901. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To John L. French, administrator of Eugene Rhodes, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Young Women's Christian Home is appellant and you are appellee, to show cause, if any there be, why the decree ren

dered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of March, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 19th day of March, 1901.

WM. HENRY DENNIS,
Solicitor for John L. French, Administrator.

(Endorsed:) Court of Appeals, District of Columbia. Filed Mar. 20, 1901. Robert Willett, clerk.

Know all men by these presents, that we, Barbara Faul and Andrew Waesner, as principals, and John S. Parrott and James B. Swing, as sureties, are held and firmly bound unto John L. French, administrator of Eugene Rhodes, deceased, in the full and just sum of five thousand dollars to be paid to the said John L. French, administrator of Eugene Rhodes, deceased, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of March, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between the said Barbara Faul, Andrew Waesner, and John L. French, administrator of Eugene Rhodes, deceased, as appellants and George W. Hulick and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, and The Young Women's Christian Home, as appellees, a decree was rendered against the said Barbara Faul, Andrew Waesner, George W. Hulick and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, and The Young Women's Christian Home, and the said Barbara Faul and Andrew Waesner, having obtained an appeal, with supersedeas, and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said John L. French, administrator of Eugene Rhodes, deceased, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Barbara Faul and Andrew Waesner shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

BARBARA FAUL. [SEAL.]
ANDREW WAESNER. [SEAL.]
By J. B. SWING, *His Att'y.* [SEAL.]
JOHN S. PARROTT. [SEAL.]
JAMES B. SWING. [SEAL.]

Sealed and delivered in the presence of—

MINA FAUL AND
BESS WASNER.

MINA FAUL AND
BESS WASNER.
WADE CUSHING,
F. E. LANGDON.
As to J. B. S.

Approved by—
R. H. ALVEY,
Chief Justice.

(Endorsed:) 1010. Barbara Faul *et al.*, appellants, *vs.* George W. Hulick *et al.* Supersedeas bond Faul and Wasner, on appeal to Supreme Court United States. Court of Appeals, District of Columbia. Filed Mar. 25, 1901. Robert Willett, clerk.

WASHINGTON, D. C., *March 22d*, 1901.

I hereby consent to the approval by the Court of Appeals of the District of Columbia of the within supersedeas bond on appeal to the Supreme Court of the United States.

J. W. SMITH,
Attorney for John L. French, Administrator of Eugene Rhodes, Deceased, Appellee.

UNITED STATES OF AMERICA, *ss:*

To John L. French, administrator of Eugene Rhodes, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Barbara Faul and Andrew Wasner are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this twenty-fifth day

of March, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted March 25, 1901.

WM. HENRY DENNIS,
Solicitor for John L. French, Administrator, Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 26, 1901. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 46 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Barbara Faul, Andrew Wasner and John L. French, administrator of Eugene Rhodes, deceased appellants *vs.* George W. Hulick, and John B. Larner, administrators *c. t. a.* of the estate of Sophia Rhodes, deceased, The Young Women's Christian Home, No. 1010, January term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 27th day of March, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,098. District of Columbia Court of Appeals. Term No. 285. The Young Women's Christian Home, appellant, *vs.* John L. French, administrator of Eugene Rhodes, deceased. File No. 18,099. Term No. 286. Barbara Faul and Andrew Wasner, appellants *vs.* John L. French, administrator of Eugene Rhodes, deceased. Filed April 3, 1901.

No. 73.

Brf. of Larner & Darlington for Appl't

Office Supreme Court U.S.
FILED
OCT 29 1902
JAMES H. McKENNEY
Clerk

Filed Oct. 29, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 285. 73

THE YOUNG WOMEN'S CHRISTIAN HOME,
APPELLANT,

Versus

JOHN L. FRENCH, Administrator, APPELLEE.

No. 286. 74

BARBARA FAUL et al., APPELLANT,

Versus

JOHN L. FRENCH, Administrator, APPELLEE.

BRIEF FOR APPELLANT YOUNG WOMEN'S CHRISTIAN HOME.

JOHN B. LARNER,
J. J. DARLINGTON,
Solicitors for the Young Women's Christian Home.

PRESS OF BYRON S. ADAMS.

9602

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. ~~285~~. 73

THE YOUNG WOMEN'S CHRISTIAN HOME,
APPELLANT.

Versus

JOHN L. FRENCH, Administrator, APPELLEE.

No. ~~286~~. 74

BARBARA FAUL et al., APPELLANT,

Versus

JOHN L. FRENCH, Administrator, APPELLEE.

BRIEF FOR APPELLANT YOUNG WOMEN'S CHRISTIAN HOME.

These appeals present in this court, for the first time, the problem frequently referred to as "Lord Mansfield's Undecided Case." It is hoped that here, at last, a solution of that problem may be found upon principle, and which shall satisfy both the reason and the sense of justice of mankind.

Statement of Facts.

The case arises under the will of Mrs. Sophia Rhodes, bearing date May 10, 1894, set forth at pp. 19-20 of the Record, making the following disposition of her property:

1. One-half of the income of her estate to be paid over to her husband, Oliver Wheeler Rhodes, during his life.

2. All of her property, subject to the foregoing provision for the husband, to become absolutely the property of her son, Eugene Rhodes.

3. In the event of the death of the son before that of either the testatrix or her husband, certain pictures and paintings to be given to the Young Women's Christian Home, to be retained as ornaments of the Home as long as it should exist, the name of the testatrix as the donor to be connected with them during that time, and all the rest of her property to vest in a trustee in trust to pay the income to the husband during his life, and to pass to the Home absolutely upon his death; or, in the event of the testatrix becoming the survivor of both her husband and her son, all her property, of every description, to pass absolutely to the Home.

The will begins with the following announcement, disclosing, in terms, the purpose of the testatrix not to die intestate as to any portion of her estate: "I now dispose of the property and estate which it has pleased Almighty God to entrust to me, as follows."

The mother and son survived the husband, and both perished at sea, under the circumstances set forth at pp. 17–18 of the Record, leaving no evidence as to which of them was actually the survivor.

George W. Hulick and John B. Larner were appointed administrators with the will annexed of the estate of the testatrix, by the Supreme Court of the District of Columbia, and, at the conclusion of the administration, finding the sum of $14,891.99 in their hands for distribution, they filed their bill in that court, in the nature of a bill of interpleader, against the Young Women's Christian Home, claiming the fund under the will, against Barbara Faul and Andrew Wassner, claiming it as next of kin of Mrs. Rhodes, and against John L. French, administrator, claiming it as the representative of Eugene Rhodes, the son.

The case being submitted to the Supreme Court of the District of Columbia upon the agreed statement of facts set forth at pp. 15–18 of the Record, that court, in an opinion printed at pp. 26–31 of the Record, awarded the fund to the Young Women's Christian Home, holding, in brief, that there was no presumption of survivorship as between the mother and son, that the will manifested an anxious intent to guard against intestacy, under any contingencies whatsoever, and that the intention of the testatrix is clearly apparent that if her husband and son should not survive her so as to receive the property, or if it remained under her control at the time of her death, that it should go absolutely to the charity she had named, namely, the Young Women's Christian Home.

From this decision Barbara Faul and Andrew Wassner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, appealed to the Court of Appeals of the District of Columbia, which court, concurring in the view that there was no presumption of survivorship as between the testatrix and her son, held, nevertheless, that the terms of the will "vesting the estate in Eugene Rhodes

Assignment of Errors.

The Court of Appeals erred,

1. In holding that the will of Mrs. Rhodes *prima facie* vested title in Eugene Rhodes.

2. In holding that the administrator of Eugene Rhodes is entitled to the estate unless it is shown affirmatively that the testatrix survived him.

3. In holding that the Supreme Court of the District of Columbia erred in the construction placed by it upon the will.

4. In refusing to hold, under the circumstances of the case, that the estate of Mrs. Rhodes is to be administered as though she were the survivor of her husband and son.

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From this decision the Young Women's Christian Home and Babara Faul and Andrew Wassner have taken the present appeals to this court.

I.

Insert Assignment of Errors

The Case for the Son's Administrator.

In both the Supreme Court and the Court of Appeals of the District of Columbia, the case of John L. French, administrator of Eugene Rhodes, rested upon the contention that the son, being the younger, the stronger and a good

swimmer, should be presumed to have survived, which proposition in each of the lower courts was supported by an exceedingly able brief and argument advocating the superiority of the doctrine of the civil law upon this question over that of the English common law. That, however, under the common law, facts of the character thus relied upon are insufficient to create any presumption upon which courts can act, is established by authorities from the earliest times and uniformly. The rule is variously stated, either that, in the absence of evidence to prove the fact, both parties will be presumed to have died at the same time, or that the course of distribution and descent will be the same as if the deaths had been simultaneous. Bradshaw *v.* Toumlin, 2 Dick, 633; Wright *v.* Samada, 2 Phill, 261; S. C., 2 Salk, 593; Satterthwaite *v.* Powell, 1 Curt, Ecc. Rep., 705; Durant *v.* Friend, 5 De G. & Sm., 343; Barnett *v.* Tugwell, 31 Beav. 232.

A celebrated case upon the subject is that of Underwood *v.* Wing, 19 Beav., 459, reported also under the title of Wing *v.* Angrave, 8 H. L. C., 183, in which case the Master of the Rolls, the Lord Chancellor and the House of Lords concurred in the conclusion that, under the common law, there could be no presumption of prior decease, in the absence of proof, although the husband was in good health, a very strong and powerful man and an able swimmer, while his wife was in delicate and weak condition, and their children of tender age; and this has ever since been the accepted conclusion in the English courts. *In re* Wainwright, Sw. & Tr., 257; *In re* Ewart, 1 Sw. & Tr., 258; *In re* Wheeler, 31 L. J., P. & M., 40.

In America, the uniform current of authority is to the same effect, a leading case being that growing out of the loss of Mrs. Ridgway, 69 years of age, her son-in-law, 45 years of age, and her grandchildren, aged 10 and 7 years,

respectively, out of which grew *In re* Ridgway, 4 Redf. 226; Stinde *v.* Goodrich, 3 Redf., 87; Newell *v.* Nichols, 12 Hun., 604; and Newell *v.* Nichols, 75 N. Y., 78, all holding that there is no presumption of prior decease in cases of this character without evidence tending to prove the fact. To the same effect are *In re* Hall, 9 Cent. L. J., 281; Johnson *v.* Merrithew, 80 Me., 111, 116; Cowen *v.* Rogers, 73 Md., 403; Ehle's Estate, 73 Wis., 445, 459–460; *In re* Wilbor, 20 R. I., 126.

This view was, in terms, adopted by both the Supreme Court and the Court of Appeals of the District of Columbia, nor can any English or American authority, it is believed, be found to the contrary. And, this being the uniform result of the authorities, both English and American, including as stated the decisions of both the lower courts in the case at bar, it would seem to be conclusive of the claim of French, administrator of Eugene Rhodes, except for what appears to be a wholly novel view taken by the Court of Appeals.

II.

The Decision of the Court of Appeals.

That learned court, having held, first, that the Young Women's Christian Home could not succeed to the fund under the circumstances which have happened, no matter how plain the intent of the testatrix, in the absence of evidence that she, literally, "became the survivor of both her husband and her son," and having further held that, "unlike the Roman law and the modern laws of some countries and States derived or adopted therefrom, the common law indulges no presumption of survivorship, whatever may have been the age, sex or physical condition of the respective persons proved to have lost their lives in a common disaster," and adopting as conclusive upon this

question Underwood *v.* Wing, 4 DeG., M. & G., 633, and Wing *v.* Angrave, 8 H. L. C., 83, concludes, nevertheless, that the terms of the will vested the estate in the son immediately upon the death of the testatrix, and that "it raises a *prima facie* right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival."

This conclusion is first attempted to be reasoned out by the learned court, through a supposed analogy between suits in ejectment and cases like the present. In ejectment it is stated, "the burden is upon the plaintiff to show not only his descent from some common ancestor to the person last legally seized, but also the extinction of all lines of descent that could take in preference," citing Posey *v.* Hanson, 10 App., D. C., 496, 505, and other cases. "And the rule seems to be substantially the same where the action is to recover or establish a claim to personal property," citing Schneider *v.* Pressner, 54 Ind., 524, 525, and other cases.

This analogy, it is respectfully submitted, fails in a most important particular. In ejectment, and in the analogous proceedings for the recovery of personal property, the defendant is in possession of the property, and is to be deprived of it by the plaintiff only upon terms of showing a superior right, the defendant being under no requirement or necessity of showing any title whatsoever in himself. In cases like the present, the property is in the possession of the court, all claims stand upon an equal footing, and only those who show the superior right can be entitled.

The Court of Appeals itself notes this want of analogy, and declares that, if there were no will, it would have great difficulty in determining whether or not under the Statute of Distributions there would be a *prima facie* right in the son requiring affirmative proof that the mother survived in order to displace those claiming under him; and it rests its

decision upon the proposition that, the existence of a will, giving the property to the son only in case he should survive the testatrix, goes further than the Statute of Distributions would do, and actually vests the title in the son, *prima facie*, notwithstanding the ~~established and~~ admitted legal principle that the property is to be administered as though neither had survived, but the two had died simultaneously.

That the learned court erred in the conclusion thus reached would seem to be unmistakably evident. There is no authority, precedent, or conceivable principle upon which a will can be claimed to have vested title in a legatee who did not survive his testatrix, but is to be taken as having died simultaneously with her.

Not only so, but the conclusion reached is in direct antagonism to the authorities cited by the opinion as having settled conclusively the law in cases of this kind.

Thus in Underwood *v.* Wing and in Wing *v.* Angrave, which the court declares to have finally set at rest whatever doubt may have existed upon the subject in question, the husband had left a will giving his property to the wife if she survived him, and the wife left a will giving her property, subject to certain interests in favor of her children, to her husband should he survive her. If these wills *prima facie* vested title in the beneficiaries, then the husband's property would have gone to the wife's heirs and next of kin, while the wife's property would have gone to the heirs and next of kin of the husband. The practical result arrived at and administered by the court, after eliminating the wills, however, was that each of the persons so perishing in the common disaster ~~were~~ was treated as the survivor, in so far as his or her property was concerned, the property of each going to his own heirs and next of kin.

And this has been the invariable rule, both in cases of intestacy, and where there was a will. The property, in all

the cases, has been held to descend or to be distributed as the property of him who was owner at the time of the disaster.

Thus, in cases of testacy, may be cited Taylor *v.* Diblock, 2 Phill., Eccl. Rep., 261, where a husband had made a will in favor of his wife, and both perished together, the property going to the husband's heirs; Mason *v.* Mason, 1 Meriv., 308, where a father left a will in favor of his son, both perishing together, and the property being distributed as that of the father; Goods of Murray, 1 Curt., Ecc. Rep., 596, which was a case of a will by a husband in favor of his wife, both perishing together in a common disaster; and see Doe dem. Knight, *v.* Nepean, 27 E. C. L., p. 45, in case of a will by a mistress in favor of a servant, both becoming the victims of a murder.

In cases of intestacy, see Johnson *v.* Merrithew, 80 Me., 116; Ehle's Estate, 73 Wisc., 459–460; Russell *v.* Hallett, 23 Kans., 196–7; Coye *v.* Leach, 8 Metc., 375; Schaub *v.* Griffin, 84 Md., 562, 566, in all of which cases the property was distributed as that of the owner at the time of the common disaster.

"The property remains where it is found to be vested"—that is, in the last-known owner—"unless there be evidence to show that it has been divested." Satterthwaite *v.* Powell, 1 Curt., Eccl. Rep., 705.

In the very recent case of *In re* Wilbor, 20 R. I., 126, Charlotte, Martha and Eliza Wilbor, three sisters, perished in the same calamity, no fact or circumstance appearing from which it could be inferred that either survived the other. Each left a will, devising all her real and personal estate, subject to certain legacies, "to her two sisters, or to either of the survivors, and to their heirs and assigns forever."

Under the theory or view adopted by the learned court below in this case, each of these wills would have raised "a

prima facie right in the personal representatives," and in the heirs, of the two sisters named in it, and the property of each would have devolved accordingly. The court, however, said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence all rights of succession to their estates are to be determined as if death occurred to all at the same moment. Underwood *v.* Wing, 19 Beav., 549, 4 DeGex, M. & G., 633; Wing *v.* Angrave, 8 H. L. Cas., 183; Wallaston *v.* Berkely, L. R., 2 Div., 1, Ch. 213; *Re* Wainwright, 1 Sw. & Tr., 257; Scrutton *v.* Pattello, L. R 19 Eq., 369; Coye *v.* Leach, 8 Met., 371; Johnson *v.* Merithew, 80 Me., 111; Newell *v.* Nichols, 12 Hun., 604, 75 N. Y., 78; *Re* Rall, 9 Cent. L. J., 381; Russell *v.* Hallett, 23 Kans., 276; Ehle's Estate, 73 Wis., 455; 24 Am. & Eng. Encycl. L., 1027–1032. If all three of the testators are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters or either of the survivors did not take effect, there being no interval of time as between the deaths of either during which titles to property could vest, and the wills, therefore, stand as if they contained only the bequests to the legatees subsequently named."

Upon the foregoing considerations and authorities, it is respectfully submitted, the Court of Appeals erred in holding that the will created a *prima facie* right in the son. And, if so, and if that court did not err in following the uniform current of English and American authority upon the propositon that, under the circumstances, there could be no presumption that the son survived the mother, it follows that, in no view of the case, can the administrator of the son be entitled to the fund.

III.

The only remaining question is, whether, under the terms of the will, and under the facts and circumstances of the case, the Young Women's Christian Home or the next of kin of Mrs. Rhodes have the superior right.

It is respectfully submitted that the decision of the Supreme Court of the District of Columbia should be reinstated, upon the grounds following, namely:

(*a*) That the intention of the testatrix, as plainly apparent from her will, not only amply justifies, but requires its re-instatement.

(*b*) That, as the rational and only rule upon the subject, deducible from all the authorities, the testatrix must be treated, *quoad* her own property, as the survivor, and her estate distributed accordingly.

(a)

The contention of the parties claiming through the testatrix herself is the technical one that her will should fail, because, technically, it gives her eastate to her son only in the event that he survived her, or to the Young Women's Christian Home only in the event that she survived him, neither of which events, as a matter of fact, can be certainly determined.

It is submitted, both upon principle and upon authority, that the cause should be decided upon a broader principle than that of a critical literalness in the application of the exact words employed, namely: upon the principle that a will is to be construed, not according to its letter, but according to its intent, and that mere verbal omissions, or strict literal criticisms or interpretations, are not to defeat the obvious wish of a testator, where the real intention is sufficiently plain.

The principle here urged, and the reasons for it, may be illustrated by what is believed to be the only case opposed to it, namely, that of Underwood *v.* Wing, reported finally in the House of Lords under the title of Wing *v.* Angrave, 8 H. L. Cas., 183.

In that case, Mr. Underwood and his wife, together with their three children, were lost at sea. He left a will devising and bequeathing all his estate to William Wing, in trust for his wife, if she survived him, and in trust for their children if the wife should first die; but, should the children die before attaining the age of twenty-one years and unmarried, then the whole estate to be the property of Mr. Wing. The wife, also, left a will, devising and bequeathing her property to Mr. Wing, for his sole use and benefit, in case her husband died in her lifetime, and subject to the children's interests.

Under these wills, both the husband and wife, together with their children, having died practically simultaneously, it was clearly the intent of both testators that their estate should pass to Mr. Wing; and this view of the matter was presented to the House of Lords by the Lord Chancellor, Campbell, in his dissenting opinion, with great clearness and force. See 8 H. L. Cas., 199. The case was decided, it is true, upon the narrower ground that, as Mr. Wing could not show either that the death of the husband occurred in the wife's lifetime, or that the wife's death occurred in the husband's lifetime, he could receive neither estate; and, as has been well commented upon the case, the result was that the courts were led "to make a new will for both the Underwoods, whereby they entirely set aside the family friend, whom both husband and wife had endeavored to honor, and to substitute in his place a person whom both had labored to exclude from participation in their estates."

In this result, it is believed, Underwood *v.* Wing has never

been followed by any other court. In instances of intestacy or cases of analogous nature, its conclusion that there is no presumption of survivorship, either from relationship, age, relative condition of health or the like, has been followed, almost uniformly; but we have found no other case in which the manifest intent of the testator has failed of effect through technical and literal adherence to the language of the will, without regard to its spirit and intent.

In Wing *v.* Angrave, Lord Campbell cites, in support of his dissenting view, the cases of Curius and Coponius, reported by Cicero, in which case a testator devised his estate to his supposed child *en ventre sa mére*, with remainder over if the child should die within age. The wife, as it turned out, never had been *enceinte*, and it was accordingly argued, as here, that the gift over was upon a condition, namely, the particular event of the child dying within age, which condition never happened; but the gift over was held valid on the ground that the intent should prevail, and that such stress should not be laid upon the mere words employed as to defeat the intent, instead of giving effect to it. And this view, under the same state of facts, seems to have been repeatedly maintained by the English courts: 2 Rop. Leg., 285, note 14, citing Jones *v.* Westcourt, Prec. in Ch., 316; S. P. Holcroft's case, Moor, 486; Bradford *v.* Fraley, 1 Doug., 63; Meadows *v.* Parry, 1 V. & B., 124.

It is claimed in the briefs on the other side that the doctrine of Underwood *v.* Wing has never been questioned, but has since been accepted by all courts as the undisputed doctrine governing in such cases. This claim is substantially true in so far as Underwood *v.* Wing repudiates the proposition that the fact of survivorship can be determined upon the speculative, uncertain and unsatisfactory conjectures to which age, sex, and physical conditions may give rise; but it is believed that no case can be found in which the case

has been recognized or followed in its subordination of the plain intent of the testator to the strict letter of the language employed in the instrument.

Of the cases cited in the opposing briefs, Russell *v.* Hallett, 23 Kans., 194; Johnson *v.* Merithew, 80 Me., 111; Cowman *v.* Rogers, 73 Md., 403; and Ehle's Estate, 73 Wisc., 445, are cases in which no question of the construction of wills was involved, there being no will in any of them except Ehle's Estate, and in that case the circumstances established the fact satisfactorily that the testator was the first to die.

The leading case subsequent to Underwood *v.* Wing, involving any similar question as to the construction of a will is that of Newell *v.* Nichols, 12 Hun., 604, affirmed in 75 N. Y., 78; and in that case the decision of both the lower and the appellate tribunal were contrary to that in Underwood *v.* Wing, and in entire harmony with the decision of the Supreme Court of the District of Columbia in the present case.

In that case, a wife had died leaving a husband, a son and a daughter. By her will, she created three funds—one of $30,000, the income of which was to go to the husband during his life, upon his death to the heirs of her body then living, and, in default of such heirs, to certain named remaindermen; another fund of $15,000, the income to go to the daughter for life, the principal at her death to be paid to the heirs of her body then living, in default of such heirs to her appointees by will, in default of appointment to the heirs of the body of the testatrix then living, and, in default of such heirs, then to the same ultimate remaindermen; while the third fund, also of $15,000, was settled upon the son as to the income, with the same provisions as to the principal at his death as are above stated with respect to the fund provided for the daughter. The father, son and

daughter were lost at sea, without evidence of survivorship between them.

It will be seen that, in this case of Newell *v.* Nichols, the title of the remaindermen to each of the three funds depended upon the contingency of survivorship. The $30,000 was to pass to them only in the event that, at the husband's death, there were no heirs of the body of the testatrix then living, which event did not happen unless the husband survived the two children; while as to the two fifteen thousand dollar funds, the remaindermen were entitled to neither unless, at the death of each of the two children, there was no heir of its body, no appointee by will and no heir of the body of the testatrix then living. The case was, therefore, precisely analogous to that of Underwood *v.* Wing, and, also, to the case now before the court.

The lower court (12 Hun.) held that the intention of the testatrix was clear that the property should go, in the first place, to her direct descendants, if there were any, and, if none, then to the remaindermen specified in the will; that those who claimed affirmatively the existence of heirs of the body of the testatrix at the respective deaths of the two children, must show such fact in order to defeat this intent, and that the remaindermen established their case when they proved the loss of the issue of the body of the testatrix by a common disaster, and without proof of survivorship.

And the Court cites Wright *v.* Samada (2 Salk., 593; S. C., 2 Phill., 261, note *c.*), Taylor *v.* Diplock, (2 Phill., 261), and Satterthwaite *v.* Powell (1 Curteis, 705), to the effect that the burden of proof is upon the next of kin who derive title through the survivorship of one out of several lost in a common calamity, to prove the fact—all of which cases, in effect, treat the owner of the property as the survivor, for all practical legal purposes.

These views were fully sustained by the Court of Appeals (75 N. Y., 78), holding that the intent of the will was that the limitation over to the remaindermen should be effectual if, for any reason, the children could not take; and that the death of the children without issue or appointment, under the circumstances, and in the absence of evidence of survivorship, established the title of the remaindermen, and entitled them to have the provisions of the will carried into effect.

It is true that both the Supreme Court of New York and the Court of Appeals of that State, in this case of Newell *v.* Nichols, endeavored to avoid expressly overruling Angrave *v.* Wing, by pointing out that, in the latter case, the gift over was upon a condition precedent, while in Newell *v.* Nichols the gift to the remaindermen was a conditional limitation; and this distinction is also adverted to in the opinion of the Court of Appeals in the case at bar. That the distinction, in so far as it exists, however, is wholly insufficient to account for the difference in result, or to reconcile the two cases, is abundantly apparent on the slightest consideration of the origin, object and effect of what are known as conditional limitations. At common law, remainders after estate upon condition were subject to the infirmity that, upon condition broken, only the heir could enter; so that, where the remainder was given to a third person, he was remediless if the heir refused to make entry. To remedy this evil, and for the accomplishment of no other object, "a distinction was introduced, in the case of wills, between a condition and a conditional limitation, and which has been supposed to partake more of refinement and subtlety than of solidity." 4 Kent's Commentaries, 127–8. This distinction was, that a remainder, as distinguished from a reversion, following an estate upon condition, should be construed to be, not a gift upon condition, but a conditional limitation. 2 Blackstone's Comm., 155.

But the distinction, quite apart from its just restriction to the object and purpose for which it was created and intended, cannot distinguish the result in Newell *v.* Nichols from that in Wing *v.* Angrave, for the reason that even a conditional limitation comprises both a condition and a limitation, the latter of which cannot take effect until the former has determined or defeated the precedent gift. "A conditional limitation is of a mixed nature, and partakes of a condition and of a limitation; as if an estate be limited to A for life, provided that when C returns from Rome it shall thenceforth remain to the use of B in fee; it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited, and it is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to the stranger without entry, contrary to the maxim of law that a stranger cannot take advantage of a condition broken." 4 Kent's Comm., 127–8. In other words, in the case of Newell *v.* Nichols, the gift to the Ridgway and Gunn heirs is a limitation, but one under which the estate passes to them, without entry, only upon the contingency taking place which determines the preceding gift. The death of the husband leaving no heirs of the body of the testatrix then living was a condition precedent to the fund of $30,000 passing to the Ridgway and Gunn heirs as remaindermen; and the death of the two children without heirs of their bodies, appointees by will or heirs of the body of the testatrix then living, was, in like manner, a condition precedent to the limitation becoming effective as to the two funds of $15,000 each.

"A conditional limitation is *a condition followed by a limitation over to the third person, in case the condition be not fulfilled or there be a breach of it.*" Bouvier's Law Dictionary, Tit., *Conditional Limitation.*

To adopt the analogy of actions in ejectment, and dropping from consideration as immaterial for present purposes the fact that the legal title was in trustees—immaterial, because it is elementary that equitable estates devolve in the same manner and subject to the same rules as do legal estates—would not the Ridgway and Gunn heirs have been compelled to prove, affirmatively, in support of any claim by them under the limitation, that the husband died without heirs of the body of the testatrix then living, and that the children of the testatrix died without issue or heirs of the testatrix surviving them? And, if so, how can the provisions under which they were to take be for present purposes distinguished, in any practical particular, from conditions precedent?

It is respectfully submitted that, of the grounds upon which the decision in Newell *v.* Nichols rests in the opinion of the court, the true ground is the following, from p. 622, 12 Hun.: "When a testator means to dispose of all his property, and uses the words 'If the legatee should not survive,' held to mean 'If the preceding legacy should from any cause fail.' Avelyn *v.* Ward, 1 Vesey, sr., 419; Rickman *v.* Morgan, 2 Brown's Chancery Cases, 396; Jones *v.* Westcombe, 1 Eq. Abbt., 245; Foster *v.* Cooke, 3 Brown's Ch., 347; Doo *v.* Brabant, 3 Bro. C. C., 397; Taylor *v.* Taylor, A. & R., 386; Jackson *ex dem.* Beach *v.* Durland, 2 Johns. Cas., 314."

If anything further were needed to show that the distinction between conditions precedent and limitations is insufficient to reconcile the difference in result between Newell *v.* Nichols and the case at bar in the Court of Appeals, it is furnished by the fact that, in Newell *v.* Nichols, as in the case at bar, the property before the court consisted entirely of personalty, as to which species of property the English law concurs with the civil in placing con-

ditions precedent and conditions subsequent upon the same footing. 2 Redf. on Wills, 286-7.

The principle here contended for, namely, that the intent of the testator is to be given effect, without regard to literal adherence to the language used where such literal adherence would defeat the testator's manifest desire, is laid down in all the text-books and authorities, and is illustrated by many decided cases.

As far back as the time of Lord Hobart and Lord Hale, it was declared that "the judges ought to be curious and *subtle* to invent reasons and means to make acts effectual according to the just intent of the parties." See Willes Reports, p. 682.

The intention is to be carried into effect, where apparent, although expressions must be discarded or modified to effectuate that purpose. Towns *v.* Wentworth, 11 M. P. C., 520.

And words will be supplied to that end. Abbott *v.* Middleton, 7 H. L. Cas., 68; S. C., 21 Beav. 143; Liston *v.* Jenkins, 2 W.Va., 62, and cases cited.

Where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words. Cox *v.* Britt, 22 Ark., and cases cited.

In Chapman *v.* Brown, Burr., 1635, Lord Mansfield, having declared the object of construction to be "to attain the intent," added: "For this purpose, words of limitation shall operate as words of purchase; *implications shall supply verbal omissions;* the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest."

"It sometimes happens," says the Supreme Court of Pennsylvania in McKeehan *v.* Wilson, 53 Penn. St., 74, "that through the ignorance or mistake of the testator or

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drawer of a will, words are omitted or inserted which have left unexpressed, or wrongfully expressed, what clearly appears to have been the intention of the devisor from the whole tenor of the will, and which are necessary to carry it out. The rule in such cases is well settled that the courts will permit the will to be read as if the words omitted were inserted, and those wrongfully inserted omitted, and in the place or places where they were intended to have been inserted or omitted"; citing Redfield on Wills, 454, note 1; Jarman on Wills, 456, 414, cap. 17.

So, where there was a devise to a wife during life or widowhood, "but should she marry again, then," over, and she died without re-marriage, the court inserted the words, "or when she dies," so that the devise in remainder might take effect. Aulick *v.* Wallace, 12 Bush., 531, citing numerous authorities.

A very striking case is that of *In re* Redfern, 6 Ch. Div., 133. A father, having two sons and five daughters, gave each of the sons one-seventh of his estate absolutely. The remaining five-sevenths he gave to trustees upon trust to pay the income to his daughters, Elizabeth, Sarah, Eliza, Mary and Hannah, during their lives; and on the death of Elizabeth, one-seventh to the children of Elizabeth; on the death of Sarah, one-seventh to the children of Sarah; on the *death of Eliza, one-seventh to the children of Mary;* and, on the death of Hannah, one-seventh to the children of Hannah. The court said: "I am not to be deterred by an accidental ommission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it were the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor Hale expressed in Sweeting *v.* Prideaux (2 Ch. Div., 413), that the testator must necessarily

have meant *what the mere letter of the will does not express.*" And, accordingly, "Mary," in the italicized clause above, was read "Eliza," and an entire new clause, similar in character, added for the children of Mary.

So, in Doe *dem.* Leach *v.* Micklem, 6 East, 486, the court supplied an unexpressed branch of an alternative omitted from a will, Lord Ellenborough saying: "This way of reading the will makes it intelligible and rational throughout, agrees with what, upon the whole, must, we think, have been the intent of the testator, and supplies a necessary, and what, in our opinion, is the only alternative."

See, also, Eatherly *v.* Eatherly, 1 Cold., 461; Freeman *v.* Freeman, 8 Vin. Abr., Tit. Devise, 51; Sessoms *v.* Sessoms, 2 Dev. & B., 453; Perry on Trusts, Sec. 724; Key *v.* Key, 4 Deg. M. & G., 73; Pearsoll *v.* Simpson, 15 Ves., 29.

The opinion in the last-cited case is referred to, approved and followed by this Court in Robinson *v.* Portland Orphan Asylum, 123 U. S., at p. 702, a case, also, bearing a close analogy in principle to the case at bar. In it a testator, after a provision in favor of his wife for life, provided that, if his sisters should survive his wife, they should have the income of his estate as long as they lived, the estate at their death to be divided into three parts, one for each of three charitable institutions. The sisters did not survive the wife, and it was claimed that the testator died intestate except as to the provision for the wife. This court, after citing and quoting from Metcalf *v.* Framingham Parish, *infra*, held there was a plain intention on the part of the testator to give to his widow the estate in question for her life only, not to die intestate as to any portion of it, and to limit the contingency of the gift to his sisters, only.

The court said, further: "It is true that the ultimate gift to the defendant is described as 'commencing at their death,' that is, at the death of Ann Smith and Eleanor

Cummings Robison, but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended." So, in the present case, it was even a more natural expectation on the part of the testatrix, either that she would survive her son or that her son would survive her, to receive the gift intended; and the intent is quite as plain as in the case referred to, that, if the event did not happen, the testatrix desired her property to pass to the charity specified in her will. That she intended "not to die intestate as to any portion of the estate," is equally unquestionable.

Among many other authorities stating the principle may be cited Smith *v.* Bell, 6 Pet., 68, 80; Patch *v.* White, 117 U. S., 210; Newell *v.* Nichols, *supra, et passim.*

An authority apparently in opposition to this view is cited in the brief on behalf of the appellants, Faul and Waesner, namely, the case of Gibson *v.* Seymour, 102 Ind., 485. There a wife executed a will devising her property to her husband for life, with a proviso that, if he should survive her, it should go at his death to her step-daughter. The husband dying in the lifetime of the testatrix, it was held that the court could not, by mere presumption, eliminate from the will the contingency which the testatrix had expressly annexed to it. The testatrix had not in that case, as in this, manifested an intention not to die intestate as to any portion of her estate, and doubtless contemplated the making of a new will in case she outlived her husband, the case being thus quite different from the one at bar. The court based its decision, in terms, upon the proposition that "to strike out the provision creating the contingency would make the will express a meaning entirely different from what its framer intended".

This case, therefore, would seem to be distinguishable in

its facts and in its circumstances from the case now under consideration, and to fall under the observations of this Court in Robinson *v.* Portland Orphan Asylum, *supra*, viz: "But little aid, however, in such cases is to be derived from a resort to formal rules, or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." If Gibson *v.* Seymour is not thus distinguishable in its facts and circumstances from the case at bar, then it is irreconcilable with Robinson *v.* Portland Orphan Asylum, and must yield to the higher authority of this court. It is also opposed by Aulick *v.* Wallace, *supra*.

The court is bound to give that construction which will effectuate the intention, if such intention can be gathered from the terms of the will itself; and the intention is to be gathered from everything contained within the four corners of the instrument. *In re* Swenson's Estate, 55 Minn., 300.

In re Swenson's Estate, it is also said that, in ascertaining the intention of the testator, the court is authorized to put itself in the position occupied by him at the time the will was executed, and, taking in view the then existing circumstances, to discover, from that standpoint, what was intended by the testator when using the language demanding construction. 55 Minn., pp. 308–9; Yates *v.* Shern, 84 Minn., 165.

Applying this sensible, and indeed this only fair and reasonable rule of construction to the will now in dispute, is there room for doubt or controversy that the construction given it by the Supreme Court of the District of Columbia is the correct one? Can the court place itself in the position occupied by the testatrix at the time the will was executed, and, construing it from that standpoint, doubt that

the substantial meaning and intent of the testatrix was that, unless her husband or son should survive her, all her property should pass to the Home? One method of stating that intent, from her standpoint at the time the will was made, would have been to say, as she has done, "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son Eugene Rhodes, I give and bequeath all my property to the Young Women's Christian Home." Another method of stating the same intent would have been to say, "If neither my husband nor my son should survive me, I give and bequeath my property to the Home." It is impossible to say, looking at the will from her standpoint at the time, not that what she would have intended if she had conjectured the fate which actually befell her son and herself, but that what she actually intended, would have been any better expressed by one of these forms of expression than by the other. It is only by imputing to the former one, the one actually used, a narrow not to say a cavilling literalness which no one, gathering her intention "from everything contained within the four corners of the instrument", can for a moment consider to have been intended by her, that the claims of the Home can be rejected.

As this court has said in Robinson *v.* Portland Orphan Asylum, the only question is one "of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." And this court, in the case cited, further quotes with approval the language of the Supreme Judicial Court of Massachusetts in the case of Metcalf *v.* Framingham Parish, 128 Mass., 370, 374, as follows:

> "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words he has used, and an omission to express his in-

> tention cannot be supplied by conjecture. But if a reading of the whole will produce a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

In the case last cited, thus approved by this court, the testator had left a fund for the benefit of his wife's sister and her husband, the net income to be paid to her during her life if she died before her husband, one-half of the principal to go to a charitable institution and the income of the other half to be paid to the husband for life, while, if he died before her, then at her death the whole principal to be transferred to the charity—no disposition being, in terms, made of the one-half to be set aside for the husband's benefit, and after the termination of that trust. *Held*, upon the principles above stated, that the principal of this latter half, by implication, passed to the charity, as being evidently within the intent and meaning of the testator, though not in terms expressed.

The application to the present case of the principles established by these authorities is plain. No one can read Mrs. Rhodes' will without recognizing, beyond the possibility of a doubt, that she intended to dispose of the whole of her estate, and that, unless her son lived, in the language of this court in 123 U. S., p. 709, "to receive the gift intended", she purposed that it should pass to the Young Women's Christian Home. There is no room for question or dispute over these propositions; the only controversy possible is, whether the language employed to carry out this unmistakable intention is to be construed with a critical literalness which shall defeat it, or whether "the intention is to be car-

ried into effect, where apparent, although expressions must be discarded or modified to effectuate that purpose" (Town *v.* Wentworth, *supra*); whether, in words of Lord Mansfield, "implication shall supply verbal omissions, the letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest" (Chapman *v.* Brown, *supra*); whether the construction of the will shall be made "to depend much more upon the evident intent of the testator than upon the strict import of any term that he may make use of" (Lambert's Lessee *v.* Paine, *supra*); whether the clearly perceived intent "must prevail, although in giving effect to it some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance" (Finley *v.* King's Lessee, 3 Pet., p. 377), etc.

Both in the opinion of the Court of Appeals and in the brief on behalf of the next of kin of testatrix, it is urged that, although words will be rejected and words supplied to effectuate an intent which the will discloses, clauses cannot be supplied, transposed or intrepreted to meet contingencies which it may be believed the testator would have provided for if his attention had been called to them, but for which he has not in fact provided. The cases supporting this proposition are, it is believed, without exception cases turning, not as in the present case upon what the testator intended by the provision made, looking at his language from his standpoint at the time he made it, but upon what it is contended he would have done had his attention been called to contingencies differing in substance from any he in fact contemplated, and for which contingencies concededly he has not in fact meant to provide. A gift to A provided both the testator's children should die before the dates at which they were respectively to receive their shares of the

estate, unaccompanied by any remainder to A if one child should die before and the other shortly after those dates, as actually happened (Illinois Land Co. *v.* Bonner, 75 Ill., 315, 326–7); a remainder to a step-daughter in case the husband of the testatrix survived the latter, with no provision for her if the testatrix survived the husband (Gibson *v.* Seymour, 102 Ind., 485); a provision that, if further issue should be born to a daughter, all the testator's real estate should be equally divided among all present and future children of the daughter; but making no provision for division among the present if there should be no such further issue (Rupp *v.* Eberly, 79 Pa. St., 141) are examples of the authorities in question. Assuming for the present that they were correctly decided, or that they represent the weight of authority, their want of analogy to the case now before the court is plain. In each of them, looking at the will from the testator's stand-point at the time of its execution, that he failed through oversight to provide for a state of facts substantially different from those specified in his will, and that but for such oversight he would have provided for them, and in a particular way, was matter of pure inference. In the case at bar, looking at the will from the stand-point of the testatrix at the time of its execution, there is no state of facts differing in any substantial or material particular from those which the instrument shows she did contemplate, and no doubt at all that the will manifests her wish and intention as to the disposition to be made of her property under them.

The foregoing considerations and authorities, it is believed, are sufficient to justify the decision of the Supreme Court of Columbia, as correctly determining the intention of the testatrix in the case of this particular instrument, as gathered from its "four corners". It is desirable, however, if it be practicable, to arrive at some general principle which may

fairly and satisfactorily settle the long mooted difficulties to which such tragedies are supposed to give rise; and it is believed that such a principle is already established in the practical result of the cases upon the subject.

"The law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles." Lord Mansfield in Jones *v.* Randall, Cowp. 39.

(b.)

In the second place, then, we beg to submit, as the result of all the authorities upon the subject, and as the rule or principle which is to be deduced from them, that, in so far as the disposition of the estate of any person so dying is concerned, such person is to be considered as having been the survivor.

With the single exception of the case reported as Underwood *v.* Wing and Wing *v.* Angrave, the authorities, English and American, are entirely harmonious in their result, and the unsatisfactory state of the question under consideration appears to have arisen, not from any variant rulings by the courts, but from the fact that, in their opinions, they have stopped short of the formulation of any principle to which they can be referred. The courts, repudiating presumptions from age, sex, health, and similar circumstances, have simply declared that the estates of persons so dying shall descend and be distributed as if their deaths had occurred at the same moment, apparently overlooking or else ignoring the fact that neither the statute of distributions nor that of descents contains any provision governing

the descent or distribution of estates of persons dying at the same moment. As pointed out in the former portion of this brief, however, in all the reported cases of intestacy, the courts have, in fact, disposed of the estate of each person dying under such circumstances as if he were the survivor; and in every case of testacy except the Underwood case the same practical result has been administered.

As to the Underwood case, the result is very curious. The court adopts and emphasizes the formulary above referred to, namely, that the property of persons dying under such circumstances is to be disposed of as though they had died at the same moment, but without formulating any rule or principle which should govern in such cases. The will of Mr. Underwood having provided that, if he survived his wife and children, his estate should pass to Wing, and the will of the wife having provided that, if she survived her husband and children, her estate should pass to Wing, the court held that, for the purpose of giving effect to the will, the husband was not to be supposed to have survived the wife, nor the wife to have survived the husband; but, the will having been thus, in effect, abrogated, the court declared the heirs and next of kin of Mr. Underwood to be entitled to his property, as though he had been survivor, and that the heirs and next of kin of Mrs. Underwood were to take her property, as though she had been the survivor. In short, the property of neither Mr. Underwood nor of his wife was to pass as though they were, respectively, to be taken as the survivors *quoad* their own estates, in so far as their wills were concerned, but each was taken to have been the survivor, *quoad* his or her estate, in favor of their respective heirs and next of kin. That this result defeated the intent of the respective testators has very generally been conceded, and is not seriously controverted in the majority

opinions; and that it involved an illogical inconsistency in the particular above pointed out would seem to be evident. The case is in harmony in its results with every other decision upon the subject, English and American, in distributing the estates of persons perishing in a common disaster, as though each were, as to his own estate, the survivor, except that it denies to devisees or legatees under a will the benefit of that rule.

We submit that there is no reason or principle upon which any distinction between the beneficiaries under a will on the one hand, and the person next entitled under the law in cases of intestacy on the other, can be established. In the absence of evidence that her son survived her, the property of the testatrix is, under the *principle* of all the authorities, to be disposed of as though she were the survivor; and her will declares plainly her wish and intent with respect to her property in that event.

IV.

A further proposition, discussed in the brief on behalf of appellants Faul and Waesner, is believed scarcely to require comment here. This proposition is that the decree of the Supreme Court of the District of Columbia was erroneous, because it awarded to appellant all the property of Mrs. Rhodes; to which the brief objects that there is real estate in Kansas and Colorado which was not within the jurisdiction of the court below, and with respect to which there are parties in interest who were not before the court.

It is well settled that a decree or judgment will not be reversed for immaterial error; so that, if the record in this case showed the existence of any such real estate as is referred to in the brief, it would be a sufficient answer to say

that the interests of any persons who were not parties to the suit below would not be affected by the decree, and that it does not lie in the mouths of persons who *are* bound, to raise objections on behalf of persons who are not, and whom they do not represent. In the second place, there is no evidence in the record, or elsewhere, of which the court can take notice, that Mrs. Rhodes died seized or possessed of any any property which was not within the jurisdiction of the court below, or that there are any persons interested in any portion of her estate who were not parties to this cause. If there is such real property, no decision of any courts than those of the jurisdiction in which it is situated could affect it. Readman *v.* Ferguson, 13 D. C. App., 60, 64.

It is respectfully submitted as follows:

1. That the decree of the Court of Appeals of the District of Columbia, resting upon the theory that, where two persons perish in a common disaster, one of whom was the beneficiary under the will of the other, the will *prima facie* divests the testator's title and vests it in the legatee, was erroneous.

2. That, under the principles of construction governing wills, and especially the principle which subordinates the letter to the plain intention, to be gathered from the testator's standpoint and from the four corners of the instrument, the Young Women's Christian Home is the party intended by the will of Mrs. Rhodes, under the circumstances which have occurred, to receive her estate.

3. That the principle deducible from the authorities upon the subject is that, under the English law, the estate of each person so dying is to be administered as though he, as to that estate, was the survivor, and that the estate of Mrs. Rhodes is accordingly to be so administered.

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4. That the decree of the Court of Appeals of the District of Columbia should be reversed, and the decree of the Supreme Court of the District of Columbia reinstated.

JOHN B. LARNER,
J. J. DARLINGTON,
Solicitors for the Young Women's Christian Home.

Nos. 73 and 74.

Brf. of Hoehling for Appts.

Office Supreme Court U.S.
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Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 73.

THE YOUNG WOMEN'S CHRISTIAN HOME,
APPELLANT,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

No. 74.

BARBARA FAUL AND ANDREW WAESNER,
APPELLANTS,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

BRIEF ON BEHALF OF BARBARA FAUL AND ANDREW WAESNER, APPELLANTS.

A. A. HOEHLING, JR.,
Attorney for said Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4399

Supreme Court of the United States.

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No. 73.

THE YOUNG WOMEN'S CHRISTIAN HOME,
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JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

No. 74.

BARBARA FAUL AND ANDREW WAESNER,
APPELLANTS,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

Brief on Behalf of Barbara Faul and Andrew Waesner, Appellants.

STATEMENT OF CASE.

The bill in this case was filed by the administrators *c. t. a.* of Sophia Rhodes, deceased, for the purpose of requiring Barbara Faul and Andrew Waesner, brother and sister of de-

cedent; John L. French, administrator of the estate of Eugene Rhodes, deceased, a son of decedent, and the Young Women's Christian Home, named as legatee in the will of decedent, to *interplead* among themselves and establish their respective claims to the fund held by the administrators of said Sophia Rhodes, deceased, amounting to the sum of $14,891.89 (*R., pp. 1–4; 20*).

The *facts* in the case are embraced in a Stipulation (*R. pp. 15–18*), are undisputed, and are substantially as follows:

1. Sophia Rhodes departed this life, under the circumstances hereinafter stated, leaving a last will and testament, dated May 10, 1894, which was thereafter duly admitted to probate and record in the Supreme Court of the District of Columbia, and which will, so far as applicable to this case, contained the following provisions:

"*Item 1.* I give, devise and bequeath unto my husband, Oliver Wheeler Rhodes, during his life one-half (½) of the income from all my properties and estate in the next following item of this last will and testament disposed of. * * *

"*Item 2.* I now give, devise and bequeath unto my beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, * * * to be his absolutely, * * * subject only to the provisions of item 1 of this last will and testament.

"*Item 3.* In the event of the death of my son, Eugene Rhodes, before the decease either of myself or my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

"*1st.* I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. * * *

"*2nd.* All the rest, residue and remainder of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest * * * and to pay over

the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my husband's, life, and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home of Washington, in the District of Columbia, to be the property of the said home absolutely.

"*Item 4.* In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution" (*R., pp. 19, 20.*)

2. The husband, Oliver Wheeler Rhodes, predeceased his wife and son, having died on January 27, 1895, thus eliminating from consideration herein such parts of said will as related to him.

3. The testatrix, Sophia Rhodes, and her son, Eugene Rhodes, sailed together from Bremen, Germany, on the steamer "Elbe," at three o'clock p. m. on Tuesday, January 29, 1895, having started on their return to this country in response to a cablegram announcing the death of the said Oliver Wheeler Rhodes. At about half past five o'clock on the morning following their sailing, and when about due west of The Hague, the steamer collided with another steamer, the "Craithie," going from Rotterdam to Scotland. The "Elbe" was sunk in said collision, and both mother and son perished in said disaster, along with many others, but few of the passengers being saved.

4. The only evidence tending to show the order of death of mother and son is found in the agreed statement of facts (*R., pp. 15–18*).

That evidence (aside from the relative ages, physical condition, ability to swim, etc., of said persons, which under all the authorities is here inadmissible as justifying any legal *presumption* as to the order of death as distinguished from actual *proof*) is found in the testimony of *two* of the survivors of said disaster—Anna Bocker and John Vevera (*R., pp. 16–18*).

Said Bocker testified that she saw testatrix come out of her cabin, clothed in a blanket over her night dress, as if to see what was the matter, and that witness never saw her again; that subsequently (certainly some minutes after), when witness went on deck, she saw Eugene Rhodes just in front of her, and never saw him afterwards (*R., pp. 16, 17*).

Said Vevera testified that *after* the accident, when every one was on deck, he saw said mother and son on the left side of the boat, and thus describes their position:

> "The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold."

He then describes in detail his own efforts to fight his way through a crowd of sailors, who were keeping every one back; that he was cut on the wrist by an ax, but succeeded in getting by, and jumped over the side of the vessel, and was the last one to get into the lifeboat, being the nineteenth man, and that an unsuccessful effort was made to throw him out of the boat; that he saw Mrs. Rhodes and her son just prior to jumping over the side of the vessel, and that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back.

He thus concludes his statement:

"He is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away, the ship went down with a lurch, and every one on board was drowned; that *both of these parties died together*; and, so far as this affiant was able to learn, after he saw these parties on the deck, clasped in an embrace that would never be loosened until after death, no one else saw them" (*R., pp. 17, 18*).

5. Six weeks thereafter, on March 6, 1895, the body of said son, Eugene, came up in a fishing net off the coast of Holland; the body of the mother was never recovered (*R., p. 16*).

6. The foregoing is the only evidence in the case throwing any light upon the conditions immediately surrounding the death of said persons, and the relative order of their deaths is unascertainable.

Three conflicting claims are urged in this case by the several parties in interpleader:

(*a.*) By Barbara Faul and Andrew Waesner, brother and sister and only next of kin of testatrix, that none of the contingencies named in said will, namely, that the son survived the mother, or that the mother survived the son, happened; and that, therefore, in contemplation of law, the estate must be disposed of as though the death of each had occurred at the same time, and that her estate descended to her next of kin, as in case of intestacy (*R., pp. 5–8*).

(*b.*) By John L. French, administrator of Eugene Rhodes, deceased, either that the son presumptively survived the mother; that the preponderance of evidence was in favor of the son's survivorship; or that the burden of proof lay on

the other defendants, to wit, legatee or next of kin of decedent, to establish that he did not so survive the mother; and that, if he survived her, he took her estate by act of the law, and not by virtue of the will, because the will gives the same estate as he would have taken in case of intestacy, and that title by law is considered to prevail, to the exclusion of title by act of the parties (*R., pp. 10–14*).

(*c.*) By the Young Women's Christian Home (hereinafter referred to as the Home), that the provisions of the will, taken as a whole, show a plain intention that, unless the son should survive the mother, so as to become the beneficiary and enter upon the substantial enjoyment of her estate, the same should pass to the Home, to the exclusion of all persons whomsoever (*R., pp. 9, 10*).

ASSIGNMENT OF ERRORS.

The appellants, Barbara Faul and Andrew Waesner, in said case No. 286 respectfully submit that the court below *erred*—

1. In holding that upon the death of testatrix the terms of her will raise "a *prima facie* right in the personal representatives of the son, and impose the burden upon her next of kin of displacing them by proof of his mother's survival" (*R., pp. 42, 43*).

2. In holding that "proof of that fact having failed, it follows that the representatives and next of kin of the son are entitled to the entire fund" (*R., p. 43*).

3. In refusing to hold that, in contemplation of law, the relative order of death of mother and son being unascertainable by proof, the property rights and estate of each must be administered and disposed of as if death had occurred to each at the same time.

4. In refusing to hold that, in contemplation of law, in the absence of proof as to survivorship, the estate of the mother descended to these appellants as her only heirs-at-law and next of kin, as in case of *intestacy*.

For *all* of which errors, as well others appearing in the record, it is submitted that the decree appealed from herein should be *reversed*, with directions to enter a decree awarding the entire fund here in controversy to these appellants.

ARGUMENT.

I.

IT IS NOT PERMISSIBLE UNDER THE GUISE OF CONSTRUCTION TO INCORPORATE DISTINCT PROVISIONS INTO A WILL, NOR TO INSERT THEREIN CONDITIONS OR CONTINGENCIES NOT PROVIDED FOR BY THE TESTATRIX.

As above noted, *three* conflicting claims are involved in this case.

In the *first* decision below (in the supreme court of the District of Columbia, holding a special hearing in equity), the learned justice, while conceding that, in the case of the death of two or more persons in a common disaster, there is no legal or artificial presumption of survivorship, and that the property rights of each such person must be disposed of, either by descent or will, as if such persons had died at the same time; nevertheless, held that the provisions of the will of testatrix, taken as a whole, show a plain intent that the Young Women's Christian Home should receive the estate of testatrix in the event her husband and son did not sur-

vive her, "*so as to have the use and benefit of the property*" (*R., p. 31*), and, accordingly, awarded the entire estate of testatrix, real, personal, and mixed, to the Home (*R., p. 31*).

On appeal, the Court of Appeals *reversed* said decree and held, in effect, that the bequest to the Home was one upon condition; that the condition did not happen; and that, therefore, said bequest did not take effect. It further held that no presumption of survivorship may be indulged in; but it declined to hold that the property rights of each such person must be disposed of as if death had occurred to all at the same time, and decreed that the burden of proof rested upon the next of kin of the testatrix to displace those claiming as next of kin of the son, and accordingly awarded said estate to the latter (*R., pp. 33, 43*).

It is from said last part of said decision and decree that these appellants have prosecuted this appeal. Inasmuch, however, as the Home has likewise appealed, it is proper to consider, at the outset, that part of the holding of the court below which these appellants insist is correct.

The attention of the court is, therefore, first asked to the following considerations, which, it is submitted, conclusively establish that the claim of the Home to the estate here in controversy cannot be successfully maintained:

(*a.*)

Rules Governing Construction of Wills.

It will be noted that there is absolutely no ambiguity nor uncertainty in the terms and provisions of the will here under consideration. The testatrix, by apt and clear terms, expressly directed the conditions and contingencies upon which, and the persons to whom, her estate should pass.

The will, in substance, provided that, subject to certain provisions for the husband, her estate should go to her son, Eugene Rhodes, absolutely; but, in the event of the predecease of her son, then, subject to a life estate in the husband, her estate in remainder should go to the Home, absolutely; and, further, in the event testatrix became the survivor of both husband and son, her entire estate should go to the said Home, absolutely.

The result, therefore, of the provisions of said will is this: The devise to the son was on the express condition that he survived the mother; and the devise to the Home was on the express condition that she became the survivor of both husband and son, each of said devises being upon the express condition of *survivorship*.

In the *first* decision below the learned justice came to the conclusion that the possibility of death occurring to mother and son at the same moment was so remote that testatrix had never thought of that contingency, or of any consequence to follow it, but that what she evidently meant by her will, taken as a whole, was this:

> "That if her husband and son did not survive her *so as to have the use and benefit of the property*, and the same remained under her control at the time of her death, when the will speaks, then it should go absolutely to the charity she had named" (*R., p. 31*).

In other words, while said court was compelled to find that *none* of the conditions or contingencies named by the testatrix had in fact happened, yet, at the same time, it assumed that, in all probability, had it occurred to testatrix, she would have said, "If it cannot be ascertained whether my son survives me or whether I survive him, then also the

Home shall take;" and, having thus determined what the testatrix in all probability would have done, had she thought of it, said court proceeded to incorporate such condition and contingency into the will, and to give effect to its terms and provisions as so thereby enlarged.

Such action would, if permitted, necessarily result in the *making* of a will by the court instead of *construing* the one actually made by the testatrix.

The claim of the Home in this case is not based upon the contention that any of the contingencies expressed in the will have happened or can be shown to have happened, but that it was the plain intention of testatrix that the Home should become the beneficiary of the entire estate in the event of the death of all the parties, so that husband and son could not enjoy the use and benefit of the property; and accordingly the Home insists that it is the duty of the court to give effect to such supposed intention of the testatrix by the insertion of a provision to cover such contingency, notwithstanding the unambiguous, explicit, and express terms used by her.

It may be useful to here refer to a few well-recognized principles applicable to the *construction* of wills.

Redfield, in his work on Wills (*vol. 1, 4th ed., par. 33-1, p. 458*), has thus clearly stated the rules followed by courts, as well as the extent to which courts may go, in the matter of *construing* wills:

"It is an established rule in the construction of wills, that where it is evident the testator has not expressed himself as he intended, and supposed he had done, and the defect is produced by the omission of some word or words; and where it is certain, beyond reasonable doubt, what particular words were thus omitted, they may be supplied by intendment,

and the will read, and construed, as if those words had been written in the place, or places, where they were intended to have been."

This applies to a case where testator has not expressed himself as he intended or as he supposed he had, because of the omission of some word or words. What he says and what he intended to say must both be manifest, and if the words used do not express what he manifestly intended, the manifest intention will prevail. If a sentence be incomplete, but the intention of the testator is apparent, the sentence will be completed; but to authorize the supplying of omitted words, it must be certain, beyond reasonable doubt, that the testator intended to use such words, and by some mistake omitted them thinking he had used them.

But nothing of the kind occurred in the present will: it is not contended that testatrix used any words she did not intend to use, or that she omitted, in any sentence or provision, words that she intended to use. The words used are the words manifestly intended; the meaning is clear; it is not a case of ambiguity, and it is not a case for construction. There is no mistake in the will, nor is there any sentence of uncertain meaning.

Hence, to here supply a provision to cover a totally distinct contingency, would not be the correcting of a mistake; nor would it be the supplying of a word or words omitted. This is clear beyond dispute.

The author continues:

"But no word can be thus supplied, so long as there is any fair ground to question *what particular words were intended to have been used, which were not*" (*par. 33–2, p. 459*).

This refers evidently to the supplying of an *omitted* word which the testatrix intended to use and thought she had used. But even such a word cannot be supplied if there is any ground to question whether she intended to use that word and by mistake omitted it.

Then follows this sentence:

"And by this is meant, that, so long as different persons may be supposed to entertain different opinions, in regard to the particular *words intended to have been used*, or, at least, as to the *import of these words the will must be read as it appears*, and the meaning extracted as it best can be, from what is written."

In all this there is nothing to authorize the court to supply in a will a provision not attempted to have been written in it by the testator or to provide for a contingency for which the testator did not attempt to provide.

Again, it is stated:

"*The result of all the cases, in regard to supplying words, seems to be, that it cannot be done, unless it is clear there has been an omission, and also clear what that precise omission was.* In other words, that you cannot, by mere construction, incorporate distinct provisions into the will, however certain it may be that they were omitted by mistake" (*par. 33–15, p. 468*).

The author continues:

"In order to reach the obvious general intent of the testator, implications may supply verbal omissions, and all inaccuracies of grammar, or impropriety in the use of terms, may be corrected, if the general purport of the instrument be clear and manifest. And words may be supplied, where the sense of the clause, as collected from the context, plainly requires it. So words may be supplied, and the grammatical construction disregarded, in order to conform to the clear intent of the testator, as indicated by the whole will" (*par. 33–17, p. 469*).

This again refers to the power to supply omissions, correct inaccuracies of grammar, improper use of words, etc.

"But, as we have said at the beginning, courts will supply only such words as it is clear it was the intention of the testator to use, *and not such as appear to be requisite to carry into effect the probable intention of the testator*" (*par. 33–19, p. 470*).

Aside from the foregoing, it is proper to here add that the devise to the Home cannot be given effect by *transposing* the words used by testatrix. In item 4 of the will it is provided:

"In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes,"

the property is to go to the Home.

The contention of the Home, if followed, would result in changing said provision of the will last referred to, so that it shall read:

"If it cannot be ascertained whether my son survives me or whether I survive him,"

then also the entire estate to vest in the Home.

Such change, however, is not permissible and is not mere transposition.

In Redfield on Wills (vol. 1)—subject, "Transposition of words"—the author states:

"Where a clause in a will is insensible, or absurd, and can be rendered sensible, and consistent with the general tenor of the will, and with the extraneous circumstances, by transposition, it is generally allowable. *But words in a will, that are good sense, are not to be transposed.* And in no case, we apprehend, is a transposition of words allowable in a will,

where it apparently changes the intention of the testator, as indicated by the natural import of the words, as arranged in the will, and there is nothing to show that such was not the intent; *but only where the meaning is obscure, upon the face of the instrument, and is rendered clearer or more obvious, by such transposition*" (*par. 34–1, p. 471*).

Now, the words of testatrix, as used in this will, are good sense; therefore not to be transposed. The meaning is not obscure upon the face of the instrument, but is perfectly clear, *and but for the happening of the contingency not provided for in the will*, viz., the death of mother and son at the same time, *no question could arise as to their meaning*, nor could there be the slightest reason for any transposition whatever. If the meaning is clear and sensible, *the happening of a contingency not contemplated by testatrix cannot affect the meaning.*

Again, the author states:

"But in the construction of a will, it is not sufficient to avoid the will for uncertainty, if plainly expressed, that the dispositions are so absurd and irrational, that it is difficult to believe they could have been the real intention of the testator. To pronounce that result, they must be so uncertain as to be incapable of any clear meaning. *Where the dispositions of a will are clearly expressed, it matters not how irrational or inconsistent with the general purposes of the will they may be*, they must prevail, if there be no other objection" (*par. 34–3, p. 472*).

This would seem to be conclusive against any attempt to transpose the clear and well-chosen words of the will in order to make the will consistent with any supposed "general purposes."

In said first decision below the court did not transpose the words, but undertook to read into the will a contingency it did not contain, and one for which the testatrix had made no attempt to provide, and this is made perfectly apparent in

the opinion rendered in connection with said first decision, where the court stated:

"The possibility of death occurring to all three, or to any two, of them at the same moment was so remote that *she never thought of that contingency, or any consequence to follow it.* She had only three persons in mind as the objects of her bounty—her husband, her son and said Home, and she supposed she had covered every contingency by the *careful wording used*" (*R., p. 30*).

That is, the court proceeded to supply a provision to cover a contingency that might arise, but one that testatrix "never thought of;" * * * "she supposed she had covered every contingency by the careful wording used;" that, having contemplated and provided for two alternatives, she did not provide for a third which she admittedly did not think of; and the court then propounded the following question, and answered it in the affirmative:

"Are the established rules of construction broad enough to enable the court to properly and legally read the paper as if she had supplied the other alternative?" (*R., p. 30–1.*)

It is clear that the words so attempted to be read into the will are not a construction of the words found in the will, either by transposing them so as to make their meaning clearer, or by supplying words which testatrix intended and attempted to use, but did not use; or by saying something which she by the language she did use intended to say, but did not say clearly or correctly; on the contrary, as the court itself admitted, they are words intended to provide for a contingency which testatrix "*never thought of;*" and this is made clear beyond question where the court adds:

"If the words of the fourth item are read by themselves and given their literal meaning, *it must be held that the con-*

tingency therein named has not been shown to have happened; and, therefore, her bequest to the Home would fail" (*R., p. 30*).

So much for the rules governing the *construction* of wills.

(*b.*)

Courts may not, by construction, provide for unforeseen events.

The bequest to the Home was plainly one upon condition, to wit, *survivorship* on the part of testatrix. The burden of establishing the happening of that condition is upon the legatee claiming under such provision. That fact in this case is incapable of proof and is otherwise judicially unascertainable, and hence the bequest to the Home must fail. The court is not permitted to provide for the unforeseen event which actually happened in this case.

The authorities clearly establish this proposition.

For example, in Roper on Legacies (*vol. 1, p. 750*) the author states:

"A conditional bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event" (*2 Redfield on Wills, 283*).

And, again, the same author proceeds:

"Where the testator in the disposition of his property overlooks a particular event which, had it occurred to him, he would in all probability have provided against, the court will not rectify the omission by implying or inserting the necessary clause, *conceiving it to be too much like making a will for the testator rather than construing that already made*" (*2 id., 1464*).

To the proposition last quoted, the author cites a number of cases, which may properly be referred to in this connection.

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No case has been cited by counsel for the Home which, in any way, supports its contention.

This very question, however, was involved and decided in the leading case of Wing *vs.* Underwood (4 *De G. M. & G., 633, 654*), where, after careful consideration, decision was rendered against the construction contended for by the Home. There a bequest was contained in a will in favor of one Wing, dependent upon the condition: "And in case my wife shall die in my lifetime, then," etc. Husband and wife perished in the same shipwreck, and there was no proof of survivorship.

Lord Chancellor Cranworth, in deciding this question, stated:

"The gift to Mr. Wing is in terms made dependent, and was evidently meant to be dependent, on the single event, setting aside the children, of the testator surviving his wife: If she should survive, he gives everything to her: if she dies in his lifetime he gives everthing to Mr. Wing: it is impossible to say that there is any third case, or class of cases, to which the language of the will could possibly be applicable. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property: but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object.

"It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing: the answer is, he has not said so, neither expressly or impliedly; and if I were to attempt to supply the omission I feel that I should be making, not construing, the testator's will."

The same question was later considered in the House of Lords, in a case arising under the will of Mrs. Underwood, which gave her property to Wing, also, in case her husband

died in her lifetime, and the same decision was followed (Wing *vs.* Angrave, *8 H. L., 205*).

The facts in that case are thus stated in the report:

"Two persons, husband and wife, made their separate wills. In the husband's will, the property was given to his wife, 'and in case my wife shall die in my lifetime,' then to W. W., in trust, for the children on their coming of age, and in case all of them should die under age, then to W. W. for his absolute use and benefit. In the wife's will (made under a power given her by her deceased father, in default of the exercise of which the property was given to relatives specifically named), the property was given to the husband (subject to interest in the children), and 'in case my husband should die in my lifetime,' then to said W. W. absolutely. The husband, wife and their children perished at sea, being all swept off the deck by one wave, and all disappeared together."

It was urged by counsel on behalf of Wing that the estate should be held to have vested in him, and the union of the characters of legatee under the husband's will and appointee under the wife's will was especially urged upon the court in support of the claim of Wing—a situation of affairs very similar to the case at bar in respect of the claim of the Home. The court, however, refused to give such effect to the devise, stating:

"There is not, so far as I am aware, either principle or authority for saying that if there is a bequest to A, on a particular event, and failing that particular event, to B, that B can take if it cannot be ascertained whether the event has or has not happened. In such a state of circumstances, there is no more right in B than in A. The husband here, by his will, said, that if his wife died in his lifetime, Wing should take. *In all probability he would also, if it had occurred to him, have said, 'If it cannot be ascertained whether she dies in my lifetime or not, then also Wing shall take;' but that he has not said.*

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"On this ground I decided against Wing in Underwood *vs.* Wing. It was uncertain in that case whether Mrs. Underwood did or did not die in her husband's lifetime. * * * Mr. Underwood's next of kin were of course *prima facie* entitled to his personal estate, and as Wing could not displace this title by showing that Mrs. Underwood died in his lifetime, I held with the master of the rolls, that there was nothing to displace the *prima facie* title of the next of kin represented by the plaintiff in that suit."

The rules of decision so laid down in the cases of Wing *vs.* Underwood, and Wing *vs.* Angrave, *supra*, have never been overruled; but, on the contrary, have ever since been followed, both in England and this country.

The following additional cases are directly in point:

In Illinois Land and Loan Company *vs.* Bonner (*75 Ill., 317*) the syllabus states:

"Courts cannot provide for unforeseen contingencies. When the testator in the disposition of his property overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, *the court will not rectify the omission by implying or inserting the necessary clause.*

"A contingency to divest an estate must happen literally. When a prior estate is vested by a devise, but subject to be divested upon the happening of a contingency, the contingency must take place literally or the prior estate will not be divested."

(The above language, as will be seen, is quoted directly from *2 Roper on Legacies, 1464, supra.*)

In its opinion, the court adds:

"The testatrix did not in her will provide for the events that have happened, that is of her sister dying over eighteen and the brother under twenty-one. *In such case, a court will not provide for the unforeseen events*" (*p. 347*).

In the case of Gibson *vs.* Seymour *et al.* (*102 Indiana, 485*) the testatrix devised all of her property to her husband for life, and further provided, "If my husband survive me I desire at his death that all I may own or be possessed of shall go to and become the property of my well-beloved step-daughter," naming her. These were the only dispositions she made of her property, and the husband died before the testatrix. It was held that testatrix died intestate as to the property in question, the court in its opinion stating:

"This language is plain; its meaning is obvious. We are not at liberty to qualify or control such language in a will by conjecture or doubt arising from extraneous circumstances.

"The devise of the real estate in question to the appellant is contingent in form, and no transposition of the language of the will, which does not modify the meaning, can be made so as to render the devise other than a contingent one.

"*We may conjecture that the testatrix failed through inadvertence to express her intention as she would have done if her attention had been called by another person to the matter about which the parties to this suit are now through it contending. But courts can no more make a portion of a will than they can make an entire will.*

"We cannot say that the testatrix by her will gives the real estate in question to the appellant in fee-simple merely subject to the life estate previously given to the husband of the testatrix. She plainly made the devise of this real estate to the appellant contingent upon an event which did not happen.

"She made no expression of intention in regard to this property in the event that she should survive her husband; and there is nothing left for us but to conclude, with the court below, that as to this property she died *intestate*."

In that case, a petition was filed for a rehearing; and, in passing upon the said petition, the court delivered a careful opinion, in which it analyzed the proposition of law

last cited in the light of the text books and leading cases, and concluded by affirming the judgment previously given. The opinion will be found to contain a careful statement of the law and decided cases, and reference to it may be usefully made.

The case of Rupp *vs.* Eberly (*79 Penn. St., 141*) is frequently referred to in decisions bearing upon this question. In that case the court held that courts are not permitted to give effect to the will of the testator contrary to the plain and obvious import of the terms used by him upon a mere conjecture, and that nothing is more definitely settled than the principle that devises limited in clear and express terms of contingency do not take effect unless the events upon which they are made dependent happen.

The foregoing authorities establish that the present will cannot be so enlarged and extended, by *construction*, as to confer upon the Home title to the fund in controversy.

II.

THE WILL OF THE TESTATRIX DOES NOT SHOW AN INTENT THAT THE HOME SHOULD RECEIVE HER ENTIRE ESTATE, SAVE ONLY IN THE EVENT OF THE SUBSTANTIAL SURVIVORSHIP OF THE SON.

No more dangerous doctrine could be asserted than one which would permit the changing of testamentary dispositions to meet unforeseen conditions and contingencies, so as to make the same conform to what a particular tribunal may suppose the testatrix would have wished had she had in mind, at the time of making her will, the situation that subsequently arose, and this case well illustrates the utter impro-

priety of taking any such liberties with solemn testamentary acts.

Here the Home gravely asserts that the testatrix meant that it should be the *sole* object of her bounty and the recipient of her entire estate, "to the exclusion of all other persons whomsoever" (*R., p. 9*), in every contingency save one, namely, that the son should survive the mother, "so that he might * * * enter upon and enjoy her estate" (*R., p. 9*).

And the argument is carried to the extent of insisting that a mere *temporary* survivorship by the son, or one of *inconsiderable* duration, would not suffice, in the eyes of the law, to defeat the bequest to the Home, but that, in order to accomplish such result, the son must have survived the mother "so that he might * * * enter upon and enjoy her estate."

To accept such contention as sound would be to attach to the word "survivorship" a qualification and limitation not as yet recognized in any reported case.

The fallacy of any such contention was referred to and disposed of in the case of Wing *vs.* Angrave, *supra* (8 H. L., 205), where, in the opinion, referring to the prior decision in Underwood *vs.* Wing, Lord Cranworth stated:

"It was, as I thought, a fallacy to assume that the bequest to Mrs. Underwood had failed to take effect. Undoubtedly it had failed so to take effect as to give her any practical enjoyment of the property, for, if she was the survivor, she could not have survived for more than a few seconds, but her survivorship, if she survived but for a second, was sufficient to displace the claim of Wing, and to entitle her personal representatives to the whole personal estate of her husband. The inability to ascertain the truth no more assisted the claim of Mr. Wing than that of Mrs. Underwood's personal representatives."

As showing how utterly untenable the claim of the Home really is, and how dangerous it would be if courts were permitted to speculate upon *supposed* testamentary intentions, not expressed in words, consider for a moment the *facts:* The son was 23 years of age and unmarried. The greatest affection existed between mother and son. In the ordinary course of events it was not unlikely that he would marry and have issue. Can it be supposed that the testatrix really intended to so dispose of her entire estate to a corporation to which she owed no obligation, to the *exclusion* of the issue of her son, in the event he had such issue but predeceased her? This is another *omission* in her will which she evidently overlooked.

The argument of the Home would lead logically to this very result.

The court below commented on this very phase of the case, and clearly summed up the situation, as follows:

"Another omission of this will tends to illustrate the impropriety of giving it a construction founded upon what has been aptly called, the testatrix's 'intention' in the loose sense of that word. No provision is made for the contingency of Eugene Rhodes' death leaving issue. Consequently, upon the construction contended for, if he had married and left a child surviving him, that child would be cut out. This contingency, far more likely of apprehension than the one that did happen, was no more present in the mind of the testatrix than was the other. And there is nothing in the will or the circumstances surrounding the parties that would justify any other conception than that had it occurred to her she would have provided for it by apt words for the purpose," (*R., pp. 39, 40*).

The mere statement of any such contention is to refute it.

III.

THE AUTHORITIES CITED IN SUPPORT OF THE CONTENTION OF THE HOME ARE NOT IN POINT.

Before concluding this branch of the case, it may be proper to refer to the cases relied upon by the Home, and cited in the opinion rendered in connection with the *first* decision herein; none of which, however, it is submitted, in any way, support the contention, nor do any of them sanction the changing of a will as is sought to be done in this case.

Those cases are, in brief, as follows:

Finley *et al. vs.* King's Lessee (*3 Peters, 346*): The question here presented was whether a condition expressed in a will was precedent or subsequent, and in deciding the case the court stated what need not be here controverted, namely, that "the intent of the testator is the cardinal rule in the construction of wills." The court construed said will and determined the character of the condition, but it did not insert therein a distinct provision, nor did it undertake to hold that such insertion is permissible.

Clark *vs.* Boorman's Executors (*18 Wall., 493*): In this case the question presented was whether or not on the true construction of a will an estate devised was one in fee or life estate with vested remainder. The court left that question undecided, preferring to decide the case on another point; but incidentally in passing the point the court commented on the perplexity of questions involving construction of wills, and incidentally referred to the general principle of examining the phraseology used in endeavoring to give

effect to the intention of a testator, for example, in case of ambiguous sentences or of sentences which manifestly did not express what the testator intended, etc.; but there is nothing in the opinion in that case justifying the attempt "*by mere construction to incorporate distinct provisions into a will.*"

Colton *vs.* Colton (*127 U. S., 300*): In this case testator devised his entire estate to his wife, and added thereto a recommendation that she make such provision for the mother and sister of testator as in her judgment will be best. The widow did not make such provision, and a bill was filed on behalf of the mother and sister, praying that a trust be declared under said phraseology of the will. The court held that the language employed by testator indicated an intention to make such permanent provision, and accordingly decreed the trust.

Lee *vs.* Simpson (*134 U. S., 572*): In this case a daughter of testatrix had been bequeathed certain property and estate, with power to dispose thereof by last will and testament as she pleased. Thereafter the daughter died, leaving a last will and testament, in which she made various bequests of property, she having an estate of her own in addition to that acquired by her under the bequest aforesaid; and thereupon the question arose whether or not, in her will, testatrix had executed the power to bequeath or whether her will was intended by her to operate only upon her own individual property. The court found that it was evidently the intention of testatrix to dispose not only of her individual estate, but also the property which she had a right to bequeath under the bequest aforesaid, and the court gave effect to the will accordingly.

Robison *vs.* Orphan Asylum (*123 U. S., 702*): In this case testator provided that his widow should have the income of all his estate, with the right to spend it, but not to have it accumulate for her heirs; that his two sisters, if living at the time of the death of himself and his wife, or the one that might then be living, should "have the income of all my estate as long as they may live, and at their death to be divided in three parts," the same to go to three certain named charitable institutions. The two sisters predeceased the testator. It was held that the widow took only a life estate, with the ultimate remainder to the charitable institutions. But that decision is not in conflict with the position here asserted, since the language of the will there under consideration clearly provided a life estate only in the widow, and the predecease of the two sisters of testator, so far as affecting the right of the charitable institutions to take, was immaterial, because, as stated by the court—

"If property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift-over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift-over of the legacy or share is to take effect on the death of the prior legatee generally, or on the death under particular circumstances, and whether the legacy be immediate or in remainder."

Metcalf *vs.* Framingham Parish (*128 Mass., 370, 374*): In this case the court expressly recognized and affirmed what is here insisted upon, namely, that "an omission to express his intention cannot be supplied by conjecture."

In none of these cases, however, did the court sanction the changing of a will, by construction, by incorporating therein a distinct provision and condition.

From the authorities now referred to it would seem to be established to a demonstration that the claim of the Home herein cannot be sustained.

In connection with all of the foregoing, it must be borne in mind that it is a maxim firmly imbedded in the common law that an heir can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed (*1 Jarman on Wills, 765; Rupp vs. Eberly, supra*).

The attention of the court is now asked to a consideration of the conflicting claims interposed herein on behalf of the next of kin of the mother, on the one hand, and of the next of kin of the son, on the other.

IV.

WHERE TWO OR MORE PERSONS PERISH IN A COMMON DISASTER, AND THE ORDER OF THEIR DEATHS IS UNASCERTAINABLE BY EVIDENCE, THERE IS NO LEGAL PRESUMPTION OF SURVIVORSHIP IN FAVOR OF ANY SUCH PERSONS, AND IN SUCH CASE PROPERTY RIGHTS ARE DISPOSED OF AS IF DEATH HAD OCCURRED TO ALL AT THE SAME TIME.

In the first decision below, the learned justice held, after a most careful examination and consideration of probably all the leading reported cases that have arisen in this and other countries in which this question has arisen, that there is no legal or artificial presumption of survivorship in which a court can indulge by which to determine the survivorship between two or more persons who are lost in a common disaster, and that if there is no proof to establish such survivor-

ship, the true rule is that property belonging to either of such persons must be disposed of, either by the laws of descent or distribution, or by will, as though such persons had died at the same time (*Rec., pp. 27, 28*).

On appeal the court of appeals conceded that under the law the court is not permitted in such a case as the present to indulge in any presumption of survivorship; but it declined to follow the uniform line of authorities, holding that in such case the property rights of each such person must be disposed of to the living representatives of each respectively, in effect as if death had occurred to each at the same time (*R., p. 37*), and accordingly held that upon the death of the testatrix it is incumbent upon those claiming as her next of kin "to show the extinction of the intervening pref-"erential right of the son's representatives" (*R., p. 41*).

The opinion concludes that, under the facts and law, there is raised "a *prima facie* right in the personal representatives "of the son, and imposes the burden upon her next of kin of "displacing them by proof of his mother's survival. Proof "of that fact having failed, it follows that the representa-"tives and next of kin of the son are entitled to the entire "fund" (*R., pp. 42, 43*).

The first reported case that seems to have arisen involving this question is that of The King *vs.* Hay (*1 Wm. Blacks., 640*), in the reign of George III. When that case arose the lawyers in England were exercised concerning a state of facts new to English jurisprudence and demanding the application of principles before uninvoked. There General Standwix, his second wife, and a daughter by a former wife all perished at sea in the same calamity, and application for administration on the estate of General Standwix was made

by the maternal uncle and next of kin of the daughter, on the theory of presumption of survivorship; and a similar application was also made by the nephew and the next of kin of the General. The case was afterwards compromised, in respect of the distribution of the estate, upon the recommendation of Lord Mansfield, who said "there was no legal principle upon which he could decide it;" and it is frequently referred to as Lord Mansfield's "undecided case."

The same question arose in 1793, in the prerogative court, in Wright *vs.* Sarmuda, where husband, wife, and children all perished together in a vessel at sea, and Sir William Wynne, in a long and learned discussion, held that the presumption of survivorship could not be indulged in, and that none could transmit rights to another based upon such presumption.

In Taylor *vs.* Diplock, decided in 1815 (*2 Phill., 261*), a like case, Sir John Nichol followed the same rule. *See* also the case of Murray (*1 Curteis, 596*) and Sattherthwaite *vs.* Powel (*id., 705*).

There were two, possibly three, cases in which the English courts seemed to indulge in a presumption of survivorship or of codemise. *See* Sillick *vs.* Booth (*Younge & Collyer Ch. Rep., 121*) and *In re* Selwyn (*3 Hagg. Eccl. Rep., 748*). But the question was finally and definitely settled in Underwood *vs.* Wing (*19 Beav., 459*), which is now universally accepted, both in England and in this country, as correctly expounding the common-law doctrine. In that case it was held that, in the absence of evidence, it could not be assumed that either of two persons lost in a common disaster was the survivor. The case was appealed, and again exhaustively discussed, but with the same result (*4 De G.,*

M. & G., 633). The case then went to the House of Lords, with a like result, the decisions below being approved (*8 H. L., 183*).

Since that case the law has been definitely settled in England on the basis of that decision.

The court there held what is thus correctly stated in the syllabus:

"1. There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.

"2. Nor is there any presumption of law that all died at the same time.

"3. The question is one of fact, depending wholly on evidence; and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is upon the person asserting the affirmative."

In Greenleaf on Evidence (*vol. I, sections 29 and 30*) the author states what has been above shown, namely, that under the common law there is no presumption of survivorship in such case. The author refers to the Roman and French law (Code Napoleon), which indulged in presumptions of age, sex, etc., and also to the Mahometan law of India, where it was presumed, in the case of relatives perishing together, that they all died at the same time, and the property of each passed to his living heirs without any portion of it vesting in his companions in misfortune (*Baily's Mahometan Law of Inheritance, 172*). Such was also the rule of the Danish law. The law authorizing such presumptions to be indulged in has been incorporated in the codes of California (*73 Cal., 649*) and of Louisiana. *See* also Taylor on Evidence (*sections 202 and 203*), Best on Evidence (*pp. 303,*

394), Wharton on Evidence (2d ed.), sec. 1280, and 2 Kent's Commentaries (13th ed.), sec. 435.

One of the leading American cases upon the subject and the one most frequently referred to is that of Coye *vs.* Leach, adm'r (*8 Met., 371*). In that case a father, aged seventy-three years, his married daughter, aged thirty-three years, and her infant all perished at sea in the same calamity. A contest arose as to whether the next of kin of the father, intestate, or the next of kin of the daughter were entitled to the distribution of the father's estate. The court, in its opinion, carefully reviewed the authorities and held that no artificial presumption of survivorship could be indulged in, and that the personal estate of the father passed to his next of kin, and *not* to the next of kin of the daughter.

That case, as will be seen, was precisely similar in its facts to the present, save only that the decedent in that case left no will. The situation of the parties, however, parent and child, was precisely the same as here.

In the case of Russell *vs.* Hallet (*23 Kan., 276*) the court held:

"In the absence of other evidence, the fact as to who was the survivor where several persons perished in the same catastrophe is assumed to be unascertainable, and property rights are disposed of as if death occurred to all at the same time. While, therefore, it is correct to say the law makes no presumption on the subject, the practical consequence is nearly the same as if the law presumed all to have perished at the same moment."

Again, in the case of Ehle's estate (*73 Wis., 445*) it was held:

"In the absence of any such evidence, the question of such survivorship was necessarily to be regarded as unascertain-

able, and the rights of property to be determined as if death occurred to all at the same moment of time."

So, in the case of Johnson *vs.* Merrithew (*80 Me., 111*), the court adhered to the same rule, stating:

"In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but because from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory."

In the case of Newell, ex'r, *et al. vs.* Nichols (*12 Hun., 607; S. C., 75 N. Y. Ct. App., 78*) it was held:

"One who claims through survivorship must prove the survivorship.

"There is no presumption in law of survivorship in case of persons who perish by a common disaster.

"In the absence of other evidence, the fact is assumed to be unascertainable, and the property rights are disposed of as if death occurred at the same time, not because of a presumption of simultaneous death, but because there is no evidence or presumption to the contrary."

In the opinion in that case it is stated (*p. 89*):

"The rule is, that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect, the common law differs from the civil law."

This same rule was followed by the court of appeals of Maryland in the case of Cowman *et al.*, ex'rs, *vs.* Rogers *et al.* (*33 Md., 403*), the opinion in which contains quite an exhaustive examination of the authorities, and it was there held that in such cases the law indulges in no artificial presumptions of survivorship.

From the foregoing authorities it will be seen that this rule and principle of law has been uniformly adhered to and followed, namely, that where two or more persons perish in a common disaster, and the order of their deaths is unascertainable by proof, the law indulges in no artificial presumptions of survivorship in favor of the one or the other, by reason of age, health, sex, conditions, etc., and that the property and estate of each must be disposed of, either by the laws of descent or distribution, to the living representatives of each such person, not because the fact of codemise is presumed, but because, from the failure to establish survivorship by those asserting it, and upon whom the burden of proof rests, property rights must necessarily be settled on that theory.

Said decision below, in respect of the matter now under consideration, in presuming a *prima facie* right in the next of kin of the son, is not only not supported by authority, but, on the contrary, the uniform rule of decision is exactly the reverse, as is above conclusively shown.

Having thus erroneously *presumed* a *prima facie* right in the next of kin of the son, the said court was led to add the illogical conclusion that the burden of displacing such next of kin rests upon the next of kin of the mother by proof of the *mother's* survival, thus apparently overlooking the fact that proof of the mother's survival would effectually dispose of the next of kin of both mother and son, since in such case the bequest to the Home would take effect.

The only rational and logical solution of the situation is to adhere to the rule now universally followed by the courts, as above shown (in the absence of statutes authorizing and permitting *presumptions*), namely, that the property of each

person so perishing in a common disaster (the relative order of death being unascertainable by *proof*) shall be administered as if death had occurred to all at the same time.

In conclusion, it is respectfully submitted that the decree below is erroneous and should be reversed, so far as it awards the estate of decedent to the next of kin of the son, and that decree should be entered awarding said estate to the next of kin of the mother, namely, these appellants.

A. A. HOEHLING, JR.,
Attorney for said Appellants.

WASHINGTON, D. C.,
October 15, 1902.

No. 73 & 74.

Brf. of Stmt. & Dec. for Appellants

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 73.

THE YOUNG WOMEN'S CHRISTIAN HOME, APPELLANT,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENIE RHODES, DECEASED.

No. 74.

BARBARA FAUL AND ANDREW WAGNER, APPELLANTS,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENIE RHODES, DECEASED.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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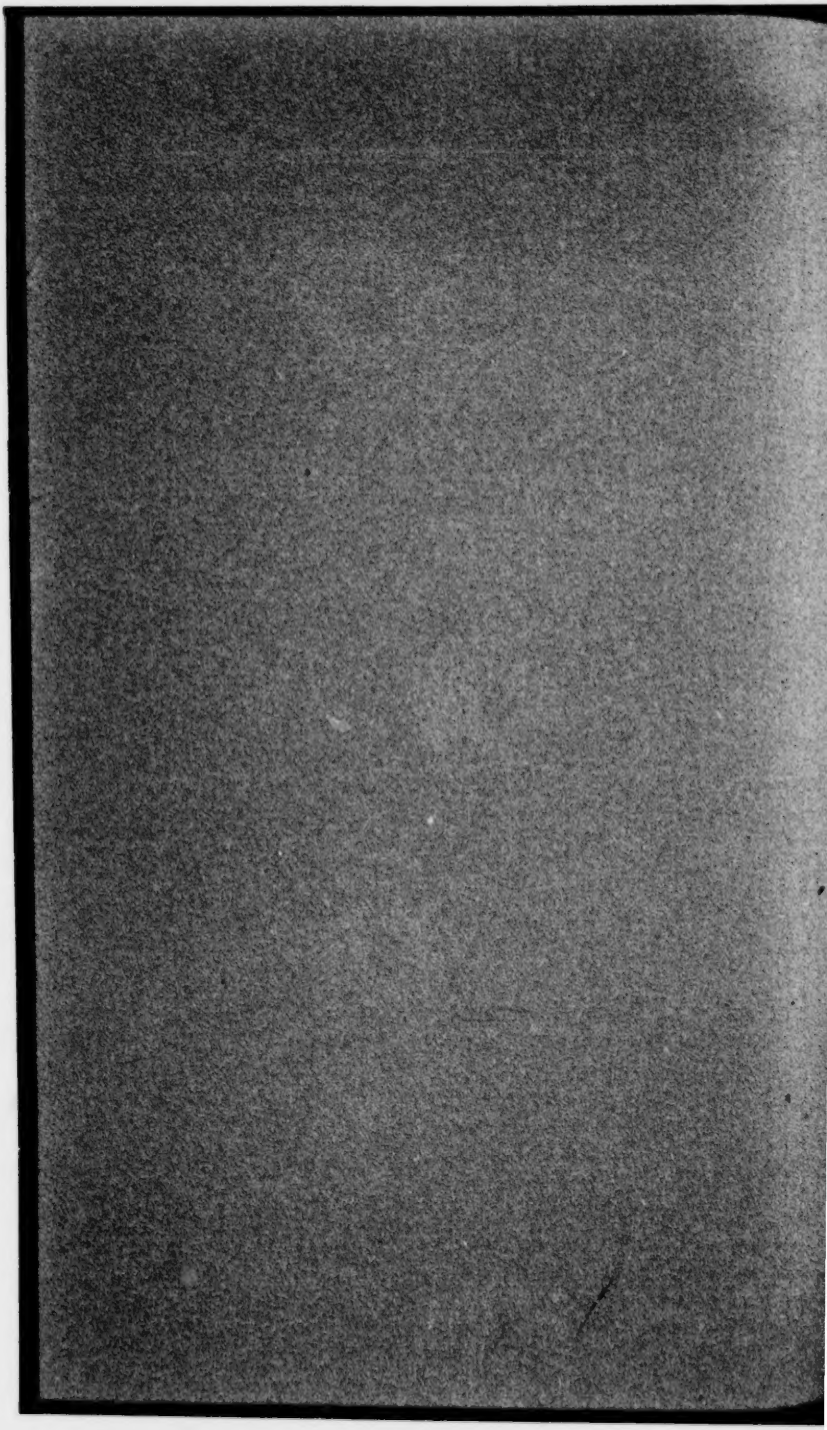

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Appellee's Statement of the Case.

This is the first time, it is believed, that the interesting question has come before the highest court of the United States of how the common law determines the succession to

personal property the owner of which and the person whom his will or the law appoints to succeed to that property in the event of his death lose their lives in the same disaster, or, more broadly speaking, in unprovable time-relation—the same question that arose in the General Stanwix case of the text books, sometimes called "Lord Mansfield's Undecided Case" (King *vs.* Hay, 1 W. Bl., 640), and later in the thoroughly considered case of Underwood *vs.* Wing, or Wing *vs.* Angrave as the case was entitled in the House of Lords (19 Beav., 459; 4 De G. M. & G., 633; 8 H. L., 183).

These cases grow out of a bill of interpleader filed in the supreme court of the District of Columbia by the administrators *cum testamento annexo* of the estate of Sophia Rhodes, deceased, *versus* three claimants or sets of claimants to the residue of her estate, viz:

(1.) The appellee, French, who is administrator of the estate of her son, Eugene Rhodes;

(2.) The appellants, Faul and Wasner, her sister and brother, who are her next of kin if her said son did not survive her; and

(3.) The other appellant, The Young Women's Christian Home, a corporation, which was substituted by her will in lieu of her son as sole legatee in the event of her becoming the survivor of both her husband and her son.

The agreed statement of facts in the record (15) includes substantially all that can be said under that head. It shows, with various attending circumstances, that the testatrix and her said son lost their lives as a result of the foundering of the steamer "Elbe" in the North sea in 1895.

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The testatrix was 52 years old, corpulent and short-winded; her son was 23 years old and a rather good swimmer. Except such disparity of age, sex, size, health, and swimming capacity, there is no evidence to show the order of the two deaths. The husband of the testatrix had died in this city three days before.

The court of first instance decided in favor of the Home, ruling against Faul and Wasner on the ground that the will gave the property to the Home in the only event whereon they could be entitled, that of *codemise* (a word coined for brevity's sake), and ruling against the son's legal representative on the ground that *codemise*, though neither proved nor presumed, was, on the score of authority, to be acted on as what actually took place (26).

The Court of Appeals was unable to see any difference between presuming *codemise* and acting on *codemise*, in the absence of evidence, as what took place. The correct position it held to be this: that as the son was preferred as beneficiary and was alive and well as late as there was any evidence of the two, the fatal burden of displacing him as of the time of his mother's death lay on those, the appellants, who could be entitled only in the event of such displacement (33).

In whatever way the matter may be reasoned out, whether (*a*) by choosing among the three contingencies possible—that the mother, the son, or neither, survived the other—or (*b*) by passing those contingencies by as unascertainable and seeking ground beyond for *prima facie* right, the result, we submit, must be the affirmance of the decision appealed from for, if the former course be followed, the son's survivorship

must be found as a fact, and, if the latter be followed, every other ground for *prima facie* right must be deemed secondary and subordinate to that of the unextinguished and unextinguishable preference made by the will and the law in the son's favor.

Argument.

Scope of the question.

The trouble peculiar to these cases arises whenever death comes, in an order of time not provable by *direct* evidence, to a property-owner and to the person appointed by law, will, or settlement to succeed to that property upon such owner's death. The subject is usually, but misleadingly, spoken of as "deaths in the *same disaster*"—"commorientes" the civilians called the decedents—as if nearness together in time and place of the two deaths was an essential feature of the trouble. A moment's thought will suffice to show that this is too narrow a view to take of the subject, and, as was said in the case of Underwood *vs.* Wing (8 H. L., 208, 217), serves only to confuse the judgment. It is not nearness together, but *uncertainty as to the order of occurrence*, of the two deaths, which first or both at once, that begets the trouble; and hence the trouble is met with as well where the deaths happen far apart in space as near together; as well where the time of one of them is known, that of the other being unknown, as where the time of each is an unknown quantity. It is for this reason that, as the precedents show, the subject merges into the ordinary death presumption from seven years of unexplained absence (Rhodes *vs.* Rhodes, 36 L. R. Ch. Div., 586; Montgomery *vs.* Bevans, 1 Saw., 660; Eagle's case, 3 Abb. Pr., 218; Whiteside's appeal, 23 Penn. St., 114; Clarke *vs.* Campbell, 15 N. J. (Eq.), 119).

Nor is it deaths alone, but other events as well, that, happening in doubtfully ascertainable relation to each other, may give rise to the trouble. A ship at sea is lost in doubtfully ascertainable time-relation to a sale or insurance effected of it on land; an animal dies, or does some act devolving liability on its then owner, about the time of a change in its ownership; an agent converts his principal's realty into personalty, or *vice versa*, just *before*, *at*, or *after* (impossible to prove which) the principal's death; a right of indemnity may turn on the imperfectly provable time-relation between a wrongful act and a change of citizenship, or upon the place-relation between that act and a State line; an inheritance may depend on the unprovable time-relation between a death and a change in the law of descent; a jurisdiction may turn on the doubtfully ascertainable locus of a contract or a crime.

These instances may be extended indefinitely. Yet in none of them has a presumption ever been contended for that the two events were coterminous, except where the *two events were human deaths and those deaths in the same disaster* (and, of course, where crime was charged). *Therein lies the peculiarity of this case.* If there is no such presumption in the law, then the order of occurrence of the two deaths, *if material*, remains to be determined just as all other issues of fact are judicially determined.

In issues of fact, in default of evidence enough to support a finding as to what the fact was, judgment goes against the side or sides on which the onus rests at the start.

1. Is there such default in this case?

2. If so, on which two of the three sides to the suit rests the fatal onus?

Sufficiency of the Evidence.

The authorities to the insufficiency of the evidence in cases of this nature go only to its insufficiency *to shift the onus* from the side resting thereunder at the start, and even those authorities had their beginning before it was as well known as it now is how very reliable disparity of age, sex, and swimming capacity is as proof of survivorship between the victims of shipwreck.[1]

Where evidence the only arbiter.

Where, at the start, presumption stands absolutely neutral, neither side having the onus or *prima facie* right, as where the decedents were joint tenants or cross-remaindermen, &c., &c., it would seem that the evidence, no matter how weak, must suffice, for no means has the law for solving questions of fact except evidence and presumption, either of which failing the other must suffice. Suppose "A" should devise his property to X, to Y, or to Z (not relations of his), in the alternative, according as he might die *before*, *after*, or at the *same time* as "B," and "A" having died in unprovable time-relation to "B's" death, his executors should bring interpleader against X, Y, and Z, substantially as has been done in this case. One of the defendants would in any event be

[1] Of the 60 women and 70 children on the "Elbe," one only survived, a woman.

Of the 176 women on the "Bourgogne," 175 were lost. Every child was lost.

Of the 976 people on the "Atlantic," 429 of whom were saved, not a woman or child was saved.

entitled, and no reason would exist for putting the onus on any two that would not equally force it on the third, thereby leaving evidence the only means to decide by.

The testimony of Vevera, the witness introduced to prove codemise, bears ample evidence on its face of its unreliability. He said (17) that on the evening preceding the disaster his attention was attracted to the testatrix and her son, "*as they seemed so happy.*" Seemed so happy! When only a few hours before they had received a cablegram of the death of a husband and father whom they had loved enough to start for his bedside across the ocean directly upon "being advised of his extreme illness." Again the witness said that on coming on deck he first went to a boat, filled with ladies, on the *right-hand* side of the vessel; that that boat after leaving the vessel a short distance was swamped, and that he then crossed to a boat on the other side, being the *last person* and the *nineteenth man* to get into that boat. It is agreed (16) that *twenty-one* persons were in that boat; and one of them was a lady who had escaped from the capsized boat and who could not possibly have passed around the vessel under the circumstances. Other reasons for doubting this witness appear on his statement, but the foregoing is enough to show that either he was too much excited at the time to know what he saw or else was not trying to tell the truth when he testified.

The testatrix's son, by reason of his better size, stronger sex, and the nature of his clothing, was probably more able than his mother to withstand the death cause. Then, too, his knowing how to swim would naturally tend to ward off despair and collapse and to give him self-possession to look out for wreckage or other means of prolonging life, keeping

himself afloat in the meantime. His younger and warmer blood must also have stood him in good stead in the icy water of that North sea.

"Where shipwreck occurs, men are more apt to be saved "than women. * * *

"Persons with apoplectic tendencies are more apt to be "struck with the disease when suddenly precipitated into "the water" (Wharton and Stillé Med. Jur., § 726).

But so manifestly more credible is it, from the known facts, that the son survived than that the mother did, or than that both died at the same exact instant of time, that if choice of one of these three propositions is to be made in the light of the evidence, unaffected by onus or *prima facie* right, it is not deemed necessary to present any further argument on the part of the son. Unless his representative has some adverse presumption to overcome, he must prevail.

Where Rested the Fatal Onus at the Start?

As between the Home, as legatee, and testatrix's next of kin—if not her son, then her brother and sister.

Logic knows but one means for the ascertainment of facts—*evidence*. Law has added one other, *presumption*, in part to meet the necessity for decision where evidence may wholly fail or be in equipoise.

Meaning of "presumption" in such cases.

The only office of presumption, in the sense the word bears here, is to allot *onus probandi* and its counterpart, *prima facie* right, between the opposing sides at the start. For instance, to presume in favor of either of the three possible happenings

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in these cases, or of either of the three parties to the suit, will have for effect simply to put the onus on the other two—a fatal onus if the evidence fail to shift it. With conclusive presumptions, or with the shifting of the onus by the evidence as it unravels, this discussion has no concern. Its sole concern is with the placement of the onus at the start, before the evidence is gone into. Who has the onus to bear of proving a fact is a question the decision of which necessarily precedes the making of that proof, and therefore cannot be determined by it. If the onus be put on each contingency alike, or on neither, it is neutralized, and, in that condition of the case, if it be material to elect among them or *to eliminate any one of them* the evidence, no matter how weak, must be held to suffice for that purpose, for no other means will exist.

There is no authority or contention for a presumption that either decedent survived the other.

Neither contingency has *prima facie* right or the onus.

That both died at the same time implies that not any, not even the smallest, particle of infinitely-divisible time intervened between the two deaths to put one of them ahead of the other, but that all of the many things that might have taken place tending to hasten one and retard the other of the two deaths just so focused and counterbalanced their influences as to cast the two deaths on the same exact instant of time. That such an almost miraculous coincidence was what actually befell nobody can believe, and to dispose of the property on that theory will be to do so in the face of almost certainty that such disposal would be found to be wrong if the actual fact should become known.

The wonder is that a contingency so against "manifest probability" (Best's Ev., Book III, pt. I, p. 369), so devoid of every feature of a legitimate presumption of fact, was ever held to be presumptive; but the reports show that it was so held by many, probably by a majority, of the cases that antedated Underwood *vs.* Wing.

Underwood *vs.* Wing and what was decided by it. (8 H. L., 183.)

Underwood *vs.* Wing was a case where, in so far as material to this inquiry, husband and wife, by mutual wills, bequeathed property each to the other, and if such other "die in my lifetime," then over to a man named Wing, who was not related to either of them. In other words, Wing was given the property in the event of *either* survivorship, but not, in terms at least, in the event of codemise.

Both lives were lost by shipwreck, without evidence to show in what order, and contest for the property arose between Wing, on the one part, relying on disparity of age, sex, and health to show the husband's survivorship, and Mr. Underwood's next of kin, on the other part, relying on the decisions that, down to that time, held codemise to be presumptive.

The precise points ruled by the case it is important to know, for to misunderstanding in that regard is easily traceable the confusion that prevails in some later cases. Those points were:

1. That in such cases the common law requires evidence from start to finish, judgment going in the end, if there be not evidence enough to shift the burden of proof, against the party resting under that burden at the start.

2. That neither codemise nor a survivorship is presumed by law, nor is the evidence such cases admit of sufficient to shift the burden of proof.[1]

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[1] The two law judges who had been called into the case, referring to the statement imputed to the master of the rolls on the trial below that "the conclusion of the law is that both died at the same moment," said:

"According to our view, this is not correct. We think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time."

And the Lord Chancellor added:

"It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination, and to adjudicate on such a principle would, I think, be proceeding on false data."

In the House of Lords Lord Campbell said:

"I need hardly say that I think there is no foundation for the doctrine * * * that when it is left doubtful which of two individuals died first, there is a presumption of law (*juris et de jure*) that they die at the same point of time. I will not say that this is impossible, although time like matter is said to be infinitely divisible, but such a presumption is not warranted by decision, by dictum, or by analogy."

In Newell *vs.* Nichols it was said:

"There is no legal presumption which courts are authorized to act upon that there was a survivor any more than

3. That as between a testator's next of kin and his legatee the burden rests on the legatee of proving the contingency or contingencies that underlie his bequest, the next of kin having *prima facie* right at the start; or, as applied to the cases at bar, the burden lies on the Home of proving co-demise or the mother's survival (*i. e.*, the son's non-survival),

Whoever was next of kin has *prima facie* right.

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that there was a particular survivor. It is not claimed that there is any legal presumption that the children died at the same time. Indeed it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and as a physical fact it may perhaps be inferred that they did not."

And in Cowman *vs.* Rogers (73 Md., 403):

"By that (the common) law where several lives are lost in the same disaster there is no presumption of survivorship by reason of age or sex; nor is it presumed that all died at the same moment.

"It is not correct to infer from this that the law presumes both to have perished at the same moment; this would be establishing an artificial presumption *against manifest probability*" (Best's Ev., Book III, pt. I, p. 369).

It would be remarkable if, after refusing the civil-law presumptions as too arbitrary, founded, as they were, on probability, the common law should have accepted in their stead the equally arbitrary presumption of codemise founded on the most extravagant improbability.

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the next of kin, whoever they were, having *prima facie* right.[1]

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[1] "The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his entire title. In the absence of any effectual disposition of the beneficial interest in personalty the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title and to rebut the *prima facie* case of the next of kin. The onus of proof is therefore upon the defendant. * * * The law of England requires evidence. * * * The master of the rolls is represented in the report of his judgment to have said: 'There is therefore 'no evidence to show who was the survivor and the con-'clusion of law is that both died at the same moment.' According to our view this is not correct. We think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time" (Opinion of the law judges).

The Lord Chancellor:

"I follow very much the line of reasoning that was adopted by the learned judges. When a person dies seized in fee of real estate, *prima facie* his heir-at-law is entitled to succeed, and he can only be deprived of that right by some devisee coming forward and showing that some will, valid in form and effectual in point of substance, was made displacing his rights. I am perfectly well persuaded that exactly the same principle is applicable to the case of personal estate; if a person dies possessed of personal estate, *prima facie* the next of kin will be entitled to it, and their right will only be displaced by some person coming forward and showing a valid and effectual disposition taking it away from them.

4. That this rule of the common law was not reversed by the terms of the two wills (*post*, 26).

Just what the master of the rolls had said was: "The result is that I think the defendant has not made out that the contingency has arisen on which his title depends"—a clear statement of failure through inability to shift the onus.

(*a*.) It will be noticed that far from holding, as the case has been interpreted to do (Best, III, part II, p. 369), that the law makes use of no artificial presumptions, in contests

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"The question in the present case is whether the plaintiff, being the next of kin or representing the next of kin, Mr. Wing shows a title depriving her of that to which, in the absence of a valid will she is entitled.

"That depends first of all on the terms of the will, and the will gives the property to Mr. Wing 'in case my wife shall die in my lifetime.' Then comes the question, On whom does the burden of proof rest to show whether the wife did or did not die in the testator's lifetime?

"I think the principle once being admitted that the *prima facie* title is in the next of kin, that it must rest on the person *who claims the property under a bequest giving it to him in that particular event*. It is not for the next of kin to show that the wife did not die in her husband's lifetime; but the person who claims under the disposition must show, *not that probably it might be one way or the other*, but that that state of circumstances did in fact occur which entitles him according to the language of the will to say that the wife did die in her husband's lifetime" (4 De Gex., McN. & G., 685).

That a man leaves an heir is always presumed. Suppose his *only* heir be lost in the same disaster with him.

Title devolves on heir whether he will or not.

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of this nature, the *case itself was ruled on a presumption*, viz., that a decedent's personalty devolves on his next of kin.

(*b.*) The case did dispose of the property *as if* both deaths occurred at the same time, but it did so, *not* because it found from the evidence, or presumed—it refused to do either—that both deaths occurred at the same time, but because such disposal was the effect of presuming devolution of title on next of kin (husband and wife are not "next of kin" to each other), and holding the evidence insufficient to displace that *prima facie* title, thereby defeating the bequests through survivorship.

(*c.*) The case, in principle, no more put the onus on the claimants through survivorship than on the claimants through codemise; it put it on legatees claiming through either, holding that the allotment of onus and *prima facie* right between the opposing sides at the start was to be determined by the capacities in which the parties appeared to the suit, whether as legatees or next of kin, and not by what the evidence might, or might not, disclose respecting the order of the deaths. Had the wills been the reverse of what they were, giving the property to Wing in the event of codemise, but not in the event of a survivorship, the burden of proof, according to the principle of the decision, would have been on him to prove such codemise, the claimants through survivorship having a *prima facie* right as next of kin.

(*d.*) What the case did not hold, and had no occasion to decide, was that the evidence would not have been sufficient had presumption been absolutely neutral.

(*c*.) That the next of kin in that case was a daughter of the testator and had been in the shipwreck, surviving her parents by a few minutes, was wholly immaterial. Had she been an aunt instead of a daughter and on the other side of the earth instead of in the disaster she would, if next of kin, have been entitled just the same under the terms of the decision rendered.

A case that closely follows and well illustrates what Underwood *vs.* Wing decided on the point of *prima facie* right as between legatee and next of kin, and that appears to have been unknown to court or counsel in Newell *vs.* Nichols, is that of Hartshorne *vs.* Wilkins (6 Nova Scotia, 276). Louisa, an illegitimate daughter of Joseph Creighton, and wife of Henry S. Bagnell, was lost, together with her three children, in a shipwreck. Her father's will, made before her marriage, bequeathed a fund in trust to pay Louisa's mother an annuity of £80, and the rest of the income to Louisa for life, the corpus of the fund to go at Louisa's death to her children, or if she died "without leaving any lawful issue" to specified nieces of the testator, subject, in the latter event, to the right of Louisa to dispose by will of £1,000 of the fund. Louisa left a will which gave £600 to her husband and £400 to her mother. Manifestly, if the fund was to be disposed of on the theory that the deaths were simultaneous, the bequests to the nieces and those in Louisa's will were good; but the court held otherwise, ruling, on the authority of Underwood *vs.* Wing, that the beneficiaries, as *legatees*, lay under the fatal onus of proving that Louisa either survived her children or died at the same time, Mr. Creighton's next of kin having *prima facie* right. Mr. Bagnell then took the same

position that the appellee takes here, that as his children were, if they survived their mother, the next of kin to Mr. Creighton, the onus did not lie on them to prove that they survived their mother, but on their adversaries to prove that either she survived her children or died at the same time. The court did not decide on that point, holding that as Louisa was illegitimate, her children, even though they survived her, were not her father's next of kin.

In not one of its features has Underwood *vs.* Wing ever been overruled.

Despite the fact that Newell *vs.* Nichols, instead of overruling Underwood *vs.* Wing, is built upon it, and that it throughout disavows presuming codemise, going so far on appeal as to use the word "impossible" respecting absolute codemise, it has been cited as an authority for the revival and the restoration to the law of that presumption, or at least for what is the same thing, distribution on the theory of non-survivorship. Unfortunately language was used by the court (12 Hun, 618) that, separated from the context, authorizes that view.

Newell *vs.* Nichols, 12 Hun, 604; 75 N. Y., 78.

After citing the cases that, before Underwood *vs.* Wing, had been ruled on a presumption of codemise, and without observing that as to that ground of decision they had been overruled by that case, the court said: "In the case at bar, there being no legal presumption of survivorship, no rights could have been transmitted by one child to the other, nor to his or her heirs or next of kin, and *under the authorities above cited* the burthen of establishing a survivorship rests upon the party who claims any portion of the estate through

such fact." Had this been all, the case must have been regarded as overruling Underwood *vs.* Wing and restoring to the law the old and repudiated presumption of codemise, for to put the onus on either of two opposites, as survivorship and codemise, is of necessity to presume the other; but the case said more. It said (617): "Nor is there any presumption that they all died at the same time," and this wholly neutralized what had been said by the words first quoted, for it served to put the onus likewise on the claimants through codemise, and to put the onus on each of the three sides is to put it on neither.

The turning point of that case was whether the children *were vested* with title to the $15,000 left in trust for each of them; for, if they were, then on their deaths, simultaneously or successively, the title of each *prima facie* devolved, under the authority of Underwood *vs.* Wing, on its next of kin, if not the other child, then the relative next in succession, and the burden rested on the Ridgways and Gunns to prove the codemise of the children and consequent "default of heirs of testatrix's body"

But it was held that the children were *not* vested with title, that the trust was active and the title was in the trustees, and that neither child had any title that could presumptively devolve at its death on the other as its survivor; that if one child had concededly survived the other, while it would have taken the $15,000 that had been held in trust for the other, it would have taken it, not as an inheritance from the other, but as a legacy under the mother's will and so burdened with the onus. In other words, that it was only as a legacy under the mother's will that either $15,000 could pass *to* or *through* one child as the survivor of the

other. This was the correct ground on which Newell *vs.* Nichols was placed (12 Hun., 607, 619, 620–'1–'2–'3), and it in nowise conflicts with Underwood *vs.* Wing. No other view of the case is compatible with the rule that codemise is not to be presumed or either of the three contingencies to be eliminated.

But if, as held in Underwood *vs.* Wing, the order of the death of testatrix and her son is to be treated as unascertainable, each of the three contingencies—the one of codemise as well as the two of survivorship—being unprovable and unpresumed, the result is that the son is not displaced at all as of his mother's death.

There is a line of cases,[1] however—and it is on these the appellants rely to displace testatrix's son as of her death—that, under cover of ambiguous terms, serve to keep alive this rejected presumption of codemise. They disavow presuming codemise, but they do presume it. They say one thing and do another. They assume to find a distinction where none exists, viz., between presuming codemise and judicially acting, in the absence of evidence, on codemise as what befell. Whatever matter of fact is made the basis of decree or judgment and is not proved is, of necessity, presumed. It was over this point that the two decisions below in the case at bar first parted company (28, 37). The vice of the ruling of the equity court lay in this, that while it conceded a failure of the only means, evidence and presumption, whereby the son could be displaced, it dis-

[1] Johnson *vs.* Merithew, 80 Me., 111.
Russell *vs.* Hallett, 23 Kans., 276.
Balder *vs.* Middeke, 92 Ills. App., 227.

placed him. It decreed a failure of the prior bequest to the son without evidence or presumption that such bequest had failed—just what Underwood *vs.* Wing refused to do. It extinguished the preference made by the will and the law in the son's favor, conceding at the same time that the only fact that could effect such extinguishment—the son's non-survivorship of his mother—could not be adjudged. The same vice permeates that entire line of decisions. Probably the best statement of the ground they rest on is that found in Johnson *vs.* Merithew (80 Me., 111). The comments in brackets are ours:

"When several lives are lost in the same disaster, there is no presumption from age or sex [that would not be a presumption, but an *inference* from evidence] that either survived the other; nor is it presumed that all died at the same moment [then neither contingency would start with the advantage of *prima facie* right or the disadvantage of the onus], but the fact of survivorship like every other fact must be proved by the party asserting it [leaving it to be inferred that the other contingency, codemise, is some freak of a fact that, *unlike* every other fact, needs not to be proved by the party asserting it, though unpresumed]. In the absence of evidence from which the contrary [*i. e.*, survivorship] may be inferred all may be considered [*i. e.*, presumed] to have perished at the same moment, not because that fact is presumed [to put the onus on either of two opposites, as survivorship and codemise, is to presume the other], but because from the failure to prove the contrary [*i. e.*, the onus lies on survivorship and in favor of codemise] by those asserting it, property rights must necessarily be settled on that theory."

But why must property rights be settled on that theory? Why, of three possible happenings, must a court, uncon-

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strained thereto by presumption, choose as and for the one that happened the one that almost certainly did not happen? What has law or justice to gain by preferring *im*probability to probability in the finding of facts? If a purse were raised for the fleetest of three horses, and two of them should come in so close together as to make it difficult to decide between them, there might be some justice or necessity for sharing the purse between the two; but for yielding it to the third, which had hardly got across the starting line by the time the race was over, no reason could exist except to relieve the judges of the embarrassment of deciding between the other two.

It is not survivorship alone, but codemise as well, not *two* only but each of the *three* happenings possible, that needs to be either proved or presumed whenever, as here, it is made the basis of claim. If the property in these cases must be denied to the appellee for want of proof or presumption that the son survived his mother, it must be denied to his adversaries for want of proof or presumption that either the mother survived her son or that both died at the same time.

Never was error harder to keep out of the law than this presumption of codemise. Condemned and banished by Underwood *vs.* Wing, it has reappeared again and again, first under one alias, then under another, lastly "as an order of distribution," only to be condemned anew as often as identified. Too indefensible to be avowed, but too convenient to be given up, "an ever-present help in time of trouble," it has been welcomed under its false names while being disavowed under its true one; but throughout all its names

and forms it has always been the same thing, a presumption of codemise and nothing else.

The latest statements of the law on this point take these forms:

"The rule as now established by the English and American cases is that where it is proved that two or more persons perished in the same calamity there is no presumption of law that one survives the others or *that all perished at the same time;* the burden of proving that one survived the others, or *that all perished simultaneously,* is on the person who asserts such to be the fact."

Greenleaf on Evidence, 16th ed., note 5 to sec. 30, p. 126.

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"There being no presumption either of survivorship or *of simultaneous death* and no evidence in the case to sustain a finding of either of those facts it is manifest that the party on whom lay the burden to establish such survivorship *or simultaneous death* has failed to make out his case, and the only question for us to determine is upon which of the parties to the suit such burden was imposed."

Hildebrant *vs.* Armes (decided by the Texas court of civil appeals on Dec. 6, 1901), 66 S. W., 128.

The italicized words would seem to mark a return to the position taken in Underwood *vs.* Wing and an abandonment of the favoritism shown by intervening cases to the contingency of codemise. If so, the three contingencies now stand *in equilibrio*—neither accepted, neither eliminated—the law saying, "The son may have survived, the mother may have "survived, both may have died at the same time,—one of "the three did take place,—but presumption does not say "which one it was." It maintains a strict neutrality, and, evidence failing, it leaves the parties to win or lose accord-

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ing to the allotment among them of *prima facie* right and *burden of proof* at the start.

But what is the precise meaning, as applied to the facts of the cases at bar, of this restored rule of the neutrality of presumption as to the order of the deaths? It cannot mean that courts are ever at liberty, on meeting in their path a *material* question of fact or law difficult of solution, to vault over the trouble, as asked to do in these cases, and light on some new source or line of title of their own legislative devising. That would be manifest error. As the depository of the judicial power, courts must meet and solve every point, no matter how fine, on which rights in litigation are made by law to turn. Hopeless conundrums are unknown and impossible to the law of property. If it be material to the success of either party to these appeals that any fact be determined, be it the elimination or the acceptance of any one of the three contingencies, that fact may not be passed by as unascertainable. It is not material to the success of the appellee that any one of the contingencies be accepted or rejected, for the court may say "the son was preferred, he "may have survived, and so long as that continues to be the "status of the cases the property can be awarded to none "other than his legal representative."

But it *is material* to the success of either appellant that one of the three contingencies be eliminated, the one of the son's survivorship, for, so long as that contingency remains uneliminated, Faul and Wasner cannot be held to have ever been testatrix's next of kin or the Home her legatee. His father having died, the son was preferred as sole beneficiary, both by the will and by the law, and he was alive and well as late as there is any evidence of the two. He may have sur-

vived his mother. Nobody can say that he did not. The preponderance of such evidence as the case admits of is to the effect that he did. His failure to survive and take is a condition precedent to the right of either appellant to take. His non-existence at his mother's death is, to borrow the language of the court in Cowman *vs.* Rogers (73 Md., 403), "a condition that must exist and must be shown to exist before the contingent right of any subsequently entitled beneficiary can possibly ripen into a perfected claim." Not until his *preferred* right be adjudged out of the way can the *deferred* and *contingent* right of either appellant be let in.

Grounds for *prima facie* right at the start.

The restored rule must, therefore, mean that, in determining which party had *prima facie* right at the start, only those grounds are admissible as do not involve the elimination of either of the three contingencies. One such ground, found and acted on in Underwood *vs.* Wing, as before shown, was that whoever is next of kin has *prima facie* right, practically an absolute right, since all the evidence such cases admit of is not enough to take it away.

Another such ground, found and acted upon by the Court of Appeals in the case at bar, is that the preference made in the son's favor gives to the appellee a *prima facie* right, that is practically an absolute right, since the evidence is not sufficient to take it away.

If it should happen, as possibly it may happen in such cases, that conflicting grounds be met with, some yielding *prima facie* right to one, some to another, and some to a third party to the suit, such grounds will need to be weighed

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against each other, and those that are paramount or preferential be allowed to control.

And if cases should be met with where all the parties to the suit stand on absolutely equal footing at the start, as in the instance mentioned (*ante*, 6), or where the decedents were joint tenants or cross-remaindermen, the ascertainment in *some way* of the order of the deaths will not be avoidable. The remedy by interpleader will fall short of being a full and complete remedy in cases of this nature if the evidence be held insufficient to show the order of the deaths where each party to the suit has no stronger claim than the others to *prima facie* right at the start.

The adjudicated cases fall into four classes:

1. Those prior to Underwood *vs.* Wing (1854), avowedly holding codemise to be presumptive.

2. Those like Sillick *vs.* Booth (1 Young and Coll. N. C., 117) and Ommany *vs.* Stillwell (23 Beav., 330) holding that, for want of any other means of decision, the evidence must suffice *where* neither side has *prima facie* right to help, or the onus to hinder, at the start.

3. Those that hold that, though the evidence fails to show and the law to presume which happened of the happenings possible, the property is to be disposed of on the theory (or, as expressed below, "as if there was proof or presumption") that the deaths occurred at the same time (Johnson *vs.* Merithew, 80 Me., 111; Russell *vs.* Hallett, 23 Kans., 276).

4. Those that hold that though no one of the sides has the onus, at the start, because of *any presumption as to which hap-*

pened of the happenings possible, yet, for *other reasons*, the onus does rest, at the start, on some one of the sides, and that it is a fatal onus, since the evidence is not sufficient to shift it.

Underwood *vs.* Wing, 8 H. L., 183.

Hartshorne *vs.* Wilkins, 6 Nova Scotia, 276.

Cowman *vs.* Rogers, 73 Md., 403.

Construction of the Will.

Argument will be presented on the part of Faul and Wasner to the point that the bequest to the Young Women's Christian Home is limited to the contingency of the mother's survival and cannot be extended by construction to include the contingency of simultaneous death. All that the appellee needs to show is that the bequest cannot be extended to cover *more* than those two contingencies; that it stops short at the third; that the *entire* contingency of the son's survivorship belongs to the appellee.

The common-law rule as to burden of proof between legatee and next of kin unaffected by the will.

It will avail the Home nothing to construe the will to give it the property as well if both deaths were simultaneous as if the mother's was last, *unless* proof or presumption be forthcoming that one or the other of those two contingencies (not the son's survivorship) was what befell. If without proof or presumption of either of those two contingencies the Home would succeed, it must secure such construction of the will as will give it the property not only if the mother survived, not only if both she and her son died at the same time, but also even if the son did survive *unless* proof of

such survival be made by his legal representative. In other words, the Home stands in need of such construction of the will as will give it *prima facie* right whatever befell, thereby reversing the common-law rule that as between legatee and next of kin the onus lies on the legatee. Recognizing this fact, the Home, by way of freeing itself of such fatal onus and of acquiring such *prima facie* right, set up in its answer (9) "that the provisions of the will of said testatrix, taken as a whole, clearly show her plain intention that *unless* her son, the said Eugene Rhodes, should survive her, *so that* he might be the beneficiary of her said will *and enter upon and enjoy her estate*, the same should pass, to the exclusion of all other persons whomsoever, to this defendant."

In other words, the Home would have the court read the will as if it said: "On condition that my son survive me for such time and in such condition that he may enter upon and enjoy my estate I give the same to him; otherwise I give it to the Home." No such will is in the case, and the belief is hard to resist that, far from intending to make such a will, the testatrix could not have been prevailed upon to make such a one. The bequest to the son, his father being dead, was without condition, the only unconditioned bequest in the will. It was absolute. It was the bequest to the Home, not that to the son, that was made, and was meant to be made, secondary and conditional.

A much nearer approach to the plain intention, and to the *plain expression* as well, of the will would have been made, it is submitted, had the Home's answer taken this form instead:

"The provisions of the will of the testatrix, taken as a whole, clearly show her plain intention that unless her son,

the said Eugene Rhodes, should predecease her or die at the same time, so that he might not be the beneficiary of her said will and enter upon and enjoy her estate, the same should pass to him to the exclusion of all other persons whomsoever."

The dominant and most natural intention of the will was that the property was not to be willed away from the son at all *unless* he was no longer in being to take it at his mother's death. His non-existence at her death was the dividing line, probably the only dividing line, she had in mind to draw between the bequest to him and that to the Home, and she drew that line with a precision of terms that, as between the appellee and the Home at least, leaves no room for doubt or construction. The will hews to the line. It is not a question of *duration* but of mere *fact* of survival. Any survival was enough, a second being as effectual as a month for the vesting of title. If the fact was, and *was ascertained to be*, that the son survived, though for a second only, and no matter in what mental condition, the appellee's right would be unquestionable, and such is to be taken to have been the testatrix's intention as fully as if such survival had been for a year. The real question is not whether the son survived long enough to do this or do that, but where the burden rests of proving the order of the deaths.

The Home moulded its pleadings to fit the exigencies of the case. It could not prove codemise. It could not prove the mother's survival. It could not, therefore, prove the son's non-survival. It rested at common law under the burden of proof. It could not point to language in the will that reversed that common-law rule or to provisions of the will that were incompatible with it. It *could* prove that the son

did not survive long enough to reap any practicable benefit from the property. That was the most it could prove. It was therefore forced to take the stand it did, viz., that mere survival is not, of itself, enough to vest title in the survivor, but that the survival, in order to have that effect, must be of such nature and duration as to be of some practicable benefit to the survivor. It is not difficult to foresee what would be the effect on titles of a decision upholding this contention, especially in that large class of cases where mother and child die almost simultaneously at time of childbirth.

It is of no concern to the Home whether testatrix's son or her brother and sister constituted her next of kin. She *left* next of kin, and such kin is legally in court, claiming adversely to the Home, and, under the ruling in Underwood *vs.* Wing, such kin has *prima facie* right *unless* deprived thereof by the terms of the will. The advantage of such *prima facie* right can be withheld from the appellee only by holding, as a fact, that testatrix's son never lived to become her next of kin.

Nothing is said in the will about *prima facie* right or burden of proof or about possible difficulty in ascertaining the order of the deaths. It may be—it probably was so—that no thought of such matters was in testatrix's mind when she made her will. Or, it may be, that such difficulty *was* thought of by her, but, as often happens in the drafting of wills, was deemed a contingency too remote to be worth providing against. In either event the result is that the burden of proof is left just where the common law put it, viz., on the Home as legatee to prove whatever fact or facts—simultaneous death or mother's survival—underlies its claim. The

careful wording of the will compels belief that had testatrix thought of any such confusion of facts as that which befell and had intended to provide for it by putting on the part of her son a burden of proof that otherwise would have rested on the Home, she would not have trusted, to that end, to the language now found in the will, but would have employed other and more appropriate terms.

The claim of the Home draws its strength, not so much from what *is* in the will as from what, judging from this post-mortem standpoint, *ought* to be there. It may be easy to believe that had testatrix foreseen that she and her son would die at the same time, or that their deaths would fall in doubtfully ascertainable time-relation to each other, she would in either event have given her property to the Home. Following the same line of thought, it is almost as easy to believe that had she foreseen that though her son would survive her he would survive for a second only, or a minute only, or an hour or day only, or not long enough to reach land, or in a hopelessly insane condition, she would also in that event have given her property to the Home. *But that is not what she did*, and the question is not what kind of a will *ought* to have been made or what kind *would* have been made had things been foreseen that were not foreseen, but what *intention* finds expression in the will that *was* made. It ought to have been provided in the will, and undoubtedly would have been had testatrix thought of it, that if her son predeceased her, leaving issue, such issue, rather than the Home, should have her property; and, further, that if her son should survive her and then die intestate, leaving his father as his heir, the Home, instead of the father, should have the corpus of the property. It is not im-

probable, too, that had it been suggested to her that, at the time of her death, the fact might be that her son had been absent, unheard of, for seven years or more, letting in the legal presumption of his death, she would have deferred that presumption for a further term at least, unless affirmative proof should be made by the Home that neither he nor any issue of his was living at her death.

It would have been competent for the testatrix by her will to put on the part of her son a burden of proof that otherwise would have rested on the Home as legatee, thereby giving to the Home a title defeasible only by proof on the son's part that he survived his mother. But that she did this would imply what nobody can believe, that her purpose in making a will was in part to put the birthright of her son, her only child, that handsome Christian lad who must have been more to her than all the world beside, in a worse plight than if she had died intestate. He was the chief object of her bounty. Her will gave all her property to *him* "to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions" in favor of his father. It would seem that in her heart she could not give him too much or that too absolutely. Manifestly her will as a limitation on his inheritance was made for one purpose only, one that became unnecessary, to provide a life support for his father. It was not made for the purpose of modifying, in any way, the rules of evidence whereby the court was to find the facts upon which the legacies were conditioned or to relieve the court from finding those facts, no matter how difficult the task might prove to be.

To read into the will, after the words "if I become the sur-

vivor," the words "or die at the same time," would be to carry construction to the utmost limit of tolerance, but having done that, to go still a step further and presume that both did die at the same time, thus supplying the necessary testamentary disposition by construction and the necessary fact by presumption, would seem to be unprecedented.

The trouble is here as it was in Underwood *vs.* Wing—not so much to give effect to the bequest over on failure of the prior bequest as *to adjudge a failure of such prior bequest.* In this case, as in that one, authorities are cited—and there are many of them—to the point that where there is a bequest over on failure in a *specified* way of a prior bequest the bequest over takes effect on the failure in *any* way of the prior bequest. But in *all* those cases the failure—*failure in some way*—of the prior bequest was proved or conceded. In the case at bar it is neither proved, presumed, nor conceded that the prior bequest to the son did fail; on the contrary, the very bone of contention is whether it failed or not.

Precisely the same point arose in Underwood *vs.* Wing and it was there ruled in terms that need only change of proper names to read as if written of this case. But in the study of that ruling it is to be kept in mind that the prior bequests in that case were to persons who could hold the status of legatees merely; whereas the prior bequest in the case at bar was to the person who, if he survived his mother, held the status both of sole legatee and sole next of kin.

Speaking of the trial that had taken place respecting Mr. Underwood's will, Lord Cranworth said:

"The wife, it was said in that case, did not, and could not, take anything, and, * * * that being so, the gift to

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the defendant, Mr. Wing, it was said, must, according to the authorities, be held to have taken effect.

"That reason did not convince me. There is abundant authority to show that if a bequest is made to A on one event, and, failing that event, on another event to B, then if the first event *does not happen*, the court may understand the testator to have meant that B should take—

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"But there is not, so far as I am aware, either principle or authority for saying that if there is a bequest to A on a particular event, and failing that particular event, to B, that B can take if it cannot be ascertained whether the event have or have not happened. In such a state of circumstances there is no more right in B than in A.

"The husband has by his will said that if his wife died in his lifetime, Wing should take. In all probability he would also, if it had occurred to him, have said, 'If it cannot be ascertained whether she died in my lifetime or not then also Wing shall take,' but that he has not said.

"On this ground I decided against Wing in Underwood *vs.* Wing. It was uncertain in that case whether Mrs. Underwood did or did not die in her husband's lifetime. * * * Mr. Underwood's next of kin were of course *prima facie* entitled to his personal estate, and as Wing could not displace this title by showing that Mrs. Underwood died in his lifetime, I held with the master of the rolls, that there was nothing to displace the *prima facie* title of the next of kin represented by the plaintiff in that suit.

"It was, as I thought, a fallacy to assume that the bequest to Mrs. Underwood had failed to take effect. Undoubtedly it had failed so to take effect as to give to her any practical enjoyment of the property, for, if she was the survivor, she could not have survived for more than a few seconds, but her survivorship, if she survived but for a second, was sufficient to displace the claim of Wing and to entitle her personal representatives to the whole personal estate of her

husband. The inability to ascertain the truth no more assisted the claim of Mr. Wing than that of Mrs. Underwood's personal representatives.

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"The rule of construction relied on by the appellant might have been contended to have been applicable if the fact had been *and had been ascertained to be* that Mr. and Mrs. Underwood both died at the same instant of time, if that could be possible" (8 H. L., 205, 209).

In the Court of Appeals he had said:

"The person who claims under the (testamentary) disposition must show, not that probably *it might be one way or the other*, but that that state of circumstances did in fact occur which entitles him according to the language of the will" (4th De G., M. N. & G., 685).

Said Lord Chelmsford, speaking of Mrs. Underwood's will:

"She clearly intended that the appellant [the Home] should "not have her property if her husband [son] survived her, "for on that event it was to go to him. The appellant can "only be entitled in case the husband [son] fails to take by "survivorship. If the husband [son] survived the appel- "lant's bequest never came into existence. But he cannot "show that the husband [son] did *not* survive and therefore "he fails altogether" (8 H. L., 221).

Lord Wensleydale said:

"There is not the least doubt that the appellant [Home] "was bound to show that he had a right according to the "true construction of the will under which he claimed. The "*onus probandi* was clearly upon him. * * *

"The evidence leaves it in total uncertainty whether the "husband [son] died before or after the wife [mother] or "whether they both died at the same instant" (8 H. L., 219).

Even Lord Campbell, the lord chancellor, who stood alone in opinion that the Underwood wills, liberally construed, gave the property to Wing in the event of codemise, conceded that codemise must first be proved, and that the onus lay on Wing. Said he (196): "*Prima facie* the next of kin are entitled and the onus is thrown on Wing, the appellant, to show a better title." And again (203): "It has been objected that there is no proof that the gift to the husband has failed. But, with great submission, the failure of this gift is *res adjudicata*." He was referring to the result of the trial below.

Whatever weight his lordship's reasoning is entitled to makes for the *res adjudicata* of the bequest to the son in the cases at bar.

Not till the equity court below had made four separate transpositions or changes of the words of the will did it succeed, and then but doubtfully, in causing them to exempt the Home from the burden of proof or to relieve the court of the duty of finding whether the son survived or not.

Of similar transpositions in the Underwood wills, Lord Wensleydale said (8 H. L., 217):

"But supposing the construction suggested should be adopted and the will read as if it had provided for the gift over 'in case the husband should not survive,' or 'in case the legacy to him should lapse' it would not, in my mind, remove the difficulty."

Wing's case was stronger than is the Home's. He was, in terms, given the property in the event of *either* survivorship; the Home in the event of *one* only.

Probability favored Wing's claim; not so the Home's.

That the bequest over was to take effect on failure of the

prior bequest found as strong support in the language, intention, and provisions of the Underwood wills as in the will of the testatrix.

It is no more a negative to prove that the son did not survive than to prove that the mother did not survive; no more an affirmative to prove that she predeceased him than that he predeceased her. As to their codemise, a proposition is not negative simply because it is narrow; not presumptive in proportion as it is improbable, but just the contrary. Moreover, that line of reasoning defeats itself, for if codemise is so very improbable as to be entitled to be deemed a negative it certainly is too improbable to be acted on as what actually took place in the case.

Suppose the will of Mrs. Rhodes be construed, as it was by the justice holding the equity court, to mean that title would pass to the Home as well if codemise occurred as if the mother survived, what will the Home gain thereby? Nothing on the score of presumption if there be no presumption of the mother's survival and none of codemise, for the sum of two nothings is nothing still. And on the score of evidence, of probability, it will profit little, if any more; for the chance of codemise having actually occurred is too infinitely small to add any computable strength to the chance of the mother's survival. Such construction, while it will put Wasner and Faul out of the cases, will not enable the Home to succeed to their strongest position, that of the next of kin on whom title is presumed to have devolved. The side of the son will be the resulting beneficiary.

If this was a suit by the Home on a contract to pay money if the deaths of E and S took place in the order of E's first and S's last, surely the Home could not succeed on proof

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that the deaths took place in doubtfully ascertainable order, or even on proof that they took place simultaneously.

If it should be held in the case at bar, as it was held in Underwood *vs.* Wing, that, notwithstanding the terms of the will, whoever was next of kin has *prima facie* right, the fatal burden of proof resting on the Home as legatee, the result will be to put the Home out of the case. Then will come the question:

Where Rests the Burden of Proving Who Was Next of Kin?

Consideration of this point has necessarily been involved, to a large extent, in what has heretofore been said of code-mise.

If by "next of kin" Underwood *vs.* Wing meant next after nearer kin lost in the same disaster with the intestate, then, contrary to its expressed denial, that case did hold that some conclusion or presumption flows from the happening of the deaths in the same disaster, viz: That such nearer kin either predeceased the ancestor or died at the same time. Necessarily the equity court drew such a presumption in the case at bar, though it disavowed presuming at all. It said, after conceding that the evidence failed to show what the order of the deaths was, "the heirs and next of kin of Mrs. Sophia Rhodes *who are known to have survived her* would take her estate in the absence of any valid testamentary disposition by her" (28).

The last that was known of the two decedents the son was alive and well, his mother's nearest relative and her preferred legatee. From that position of advantage he must be dis-

placed as of the time of his mother's death, or else his side must succeed. To displace him is part of our adversaries' case. The onus lies on them. If the law presumes that the mother's title passed to her next of kin, and refuses to find from evidence or presumption what the order of the deaths was, the result is that *the son is not displaced at all.* Some presumption, displacing the son, must be construed into the will or be drawn from the disaster, or else the appellants must fail. They need to have the law presume that the position of advantage concededly held by the son when the disaster began was lost to his side by reason of his death falling in doubtfully ascertainable time-relation to his mother's death. Now, it could have been so lost in one of two ways only, viz: (1) by his mother's surviving him—*which the law refuses to presume*—or (2) by the two deaths happening at the same time, *which the law also refuses to presume.*

Not to presume at all is a thing different from presuming that the son did not survive, for then a like presumption would arise that the mother did not survive, and the result of the two would be a presumption that neither survived, a presumption of codemise, which the law refuses. Since the three contingencies are opposites in their nature, presume against any two we may and the result will be a presumption of the third.

What the appellants need is to have the court read into the will and into the law that, if it be doubtfully ascertainable whether a parent leave a child, the one next in succession shall be deemed entitled *instead*, thereby putting the onus on the part of the child. Precisely that end is what the Home seeks in its answer in asking the will to be construed to pass title to it "*unless*" the son's survival be

proved. Precisely such placing of the onus is the effect of those statutory presumptions of codemise that some nations have provided for contingencies of this kind. There is no such statute here. No State of the Union has ever had such a statute, though four (Louisiana, California, North Dakota, and Montana) have statutory presumptions that would cause the son in this case to be deemed the survivor. Here the question of child or no child living at the parent's death is left to be found just like any other fact, the onus resting on *remoter* kin to prove that all *nearer*, once known to exist, had ceased to exist or had been absent, unheard of, for seven years, at the time of the ancestor's death.

Emerson *vs.* White, 29 N. H., 482.
Schaub *vs.* Griffin, 84 Md., 557.
Posey *vs.* Hanson, 10 D. C. App., 496.
Wharton's Ev., sec. 1280.

If these two deaths had occurred far apart in space, but in unascertainable order of time, the principle, as before shown, would be the same; but, in such case, to presume that the son's death occurred before his mother's, or at the same time, would be to so change the seven-year death presumption as to put the onus, in all cases, on the part of that one of the decedents who stood as heir or devisee to the other, to prove such other's predecease, *regardless of the period of the absence*.

Whoever needs to prove that the death of an absentee took place on or before a specified date or event (testatrix's death, for instance) *within* the seven years, or that his life continued to or beyond a specified date or event *after* the seven years, has the onus to bear, such onus shifting from

the death-affirmant to the life-affirmant at the expiry of the seven years. This is what the seven-year presumption means.

Schaub *vs.* Griffin, 84 Md., 557.

One of several heirs has been absent, unheard of, for less than seven years at the time of the intestate's death. Surely the shares of the others are not swollen by that one's part till affirmative proof be made by them that he predeceased or codeceased the intestate. The onus lies on those who would take his share to the exclusion of his creditors. Now, where is the authority or reason for saying that this advantage is lost to his side, and the onus shifted, merely by the finding of his dead body soon after the intestate's death?

To a specified extent distribution in this District is representative, thereafter *per capita*. Now, suppose the last of the representative class be the one whose life is in question, whose survival of the intestate would cause distribution to go *per stirpes*, and whose non-survival would cause a *per capita* distribution. On which the onus? Clearly it would be on the *per capita* claimants if the deaths had fallen far apart or in different calamities. Where is the authority or reason for the shifting of this onus by the happening of the two deaths in the same disaster?

Suppose that "A," and his only heir, "B," and his sole devisee, "C," should perish in the same disaster, and that "A's" property should be claimed by "B's" creditors and by "C's" legal representatives, and by the State as escheator. On which two the onus? Manifestly on the parts of the State and "C," for the law presumes that a decedent leaves heirs and that his property devolves on them, showing that

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prima facie right may exist on the part of kin lost in same disaster with ancestor.

Suppose that in a case of this kind the evidence should show that there was a survivor, but fall short of showing which it was, the intestate or his nearest relative. How could *prima facie* right be accorded to those more remote in succession without presuming that such relative predeceased the intestate?

Considering the son as legatee *only*, his side would succeed could it sustain the onus, but that side is somewhat strengthened by the fact that, if the son survived, he was next of kin also; and how possibly strengthened except by the onus being shifted or neutralized, in either of which events his side must, we submit, prevail.

If this was a question of the *incoming* instead of the *outgoing*, of the *birth* instead of the *death*, of a nearer kin, then the onus might well be held to lie on the one alleging such *change of kinship;* but for that very reason—that the onus lies on the one alleging such change—it here lies on Wasner and Faul.

In analogous cases of alternative or successive right the onus lies on later beneficiaries to displace earlier, and in Cowman *vs.* Rogers (73 Md., 403) it was held to so lie in cases of this nature.

To invent or contrive, for the purposes of the case, a presumption against the *preferred* and in favor of the *deferred* legatee—against *nearer* and in favor of *remoter* kin—would be to proceed in the direction of *defeating* rather than *promoting* the spirit of the will and the law.

Not a single case can be found, we submit, in this country at least, that held, *after contest over the point*, that as between

remoter kin and the representative of nearer lost in the same disaster with the intestate, the burden of proof lies on the latter. Coye *vs.* Leech (8 Met., 271) is the nearest approach to such a case; but no contention was set up in that case that the onus lay on the remoter kin. This omission was undoubtedly due to the fact that at that time (1844) Underwood *vs.* Wing had not arisen, and the rule still prevailed of presuming simultaneous death. In Johnson *vs.* Merithew (80 Me., 111) both parties to the suit were interested that the onus be put on the part of the nearer kin, the children.

Unless this brief has failed of its purpose, it has shown that the decision appealed from cannot be reversed without either (1) accepting codemise as what befell, or (2) believing that testatrix's will was made for the purpose, in part, of detracting from the birthright of her only child. It must overtax human credulity to believe either proposition.

Respectfully submitted.

J. W. Smith,
Wm. Henry Dennis,
Solicitors for Appellee.

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Supreme Court of the United States.

Nos. 73 and 74.—October Term, 1902.

The Young Women's Christian Home, Appellant, 73 *vs.* John L. French, Administrator of Eugene Rhodes, Deceased. Barbara Faul and Andrew Wasner, Appellants, 74 *vs.* John L. French, Administrator of Eugene Rhodes, Deceased.	Appeals from the Court of Appeals of the District of Columbia.

[January 5, 1903.]

These are appeals from a decree of the Court of Appeals of the District of Columbia on a bill of interpleader exhibited in the Supreme Court of the District by the administrators with the will annexed of the estate of Sophia Rhodes, deceased. At the conclusion of the administration there remained in the hands of the administrators a fund of $14,891.89 for distribution, which was claimed by the Young Women's Christian Home, a corporation of the District of Columbia, created by act of Congress; the next of kin of Sophia Rhodes; and the administrator of the estate of Eugene Rhodes, deceased; and the interpleader was filed to determine the rights of the parties.

The will of Sophia Rhodes was executed at Washington, May 10, 1894, and read as follows:

"In the name of the bountiful Giver of all. Amen.

"I, Sophia Rhodes, of the city of Hutchinson, in the State of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

"I now dispose of the property and estate which it has pleased Almighty God to intrust to me, as follows, viz:

"*Imprimis.* I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

"*Item* 1. I give, devise and bequeath unto my husband Oliver Wheeler Rhodes, during his life one-half ($\frac{1}{2}$) of the income from all my properties and estate in the next following item of this last will and testament disposed of, to be paid over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

"*Item* 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of what-

soever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"*Item* 3. In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"*Item* 4. In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

"*Lastly.* I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

The facts were stipulated, and may be shortly stated thus: Oliver Wheeler Rhodes died at Washington, January 27, 1895, at which time his wife, Sophia Rhodes, and their only child, Eugene Rhodes, were in Heidelberg, Germany. They sailed for home from Bremen on the steamship Elbe at three o'clock P. M. on Tuesday, January 29, 1895. About half-past five o'clock the next morning the Elbe collided with another steamship, and sank in about twenty minutes after the collision. Mrs. Rhodes was about fifty-two years old, corpulent, and short of breath, and her son was about twenty-three years old, a single man, and rather a good swimmer. His body came up in a fishing net off the coast of Holland some six weeks after the collision, but his mother's body was never recovered. Of the persons who survived the shipwreck, only two had any knowledge of the mother and son at the time of the disaster.

One of them saw Mrs. Rhodes come out of her cabin just after the collision with a blanket over her night dress, and some minutes later saw her son. The other saw the mother and son on deck after the collision, the son endeavoring to put a shawl around his mother, and she with her arms thrown around her son's neck. This person was the last to get into the last boat to leave the ship, and, when it had gotten some distance away, the ship went down with a lurch and every one on board was drowned. He testified that "both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosened until after death, no one else saw them."

The Supreme Court of the District held that there was no presumption of survivorship as between the mother and son; that the will manifested an unmistakable desire to guard against intestacy; and that the intention of Mrs. Rhodes was clearly apparent that if her husband and son should not survive her so as to receive the property, or if it remained under her control at the time of her death, it should go absolutely to the charity she had named, the Young Women's Christian Home; and decreed accordingly. From this decree Barbara Faul and Andrew Wasner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, carried the case to the Court of Appeals of the District, which concurred in the view that there was no presumption of survivorship as between the testatrix and her son, but held that the terms of the will "vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a *prima facie* right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival;" and that the representatives and next of kin of the son were entitled to the entire fund. The decree was thereupon reversed, and the cause remanded to the court below with a direction to enter a decree in conformity with that conclusion. 18 App. Cas. D. C. 9.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, and that circumstances surrounding the calamity of the character appearing on this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous. *Underwood* v. *Wing*, 4 De Gex, Mc. & G. 633; *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Newell* v. *Nichols*, 12 Hun, 604; *S. C.*, 75 N. Y. 78; *Johnson* v. *Merithew*, 80 Me. 111; *Cowen* v. *Rogers*, 73 Md. 403; *Russell* v. *Hallett*, 23 Kans. 276; *In re Willbor*, 20 R. I. 126; 1 Greenl. (15th ed.) §§ 29, 30.

Conceding this to be so, the next of kin of Mrs. Rhodes contend that her estate has passed to them as in case of intestacy, because it does not appear that the son survived the mother, or that the mother survived the son, and the estate was given to the son only in the one event, and to the Young Women's Christian Home only in the other. This view was rejected by the District Supreme Court in holding that the intention of the testatrix was plain that the Young Women's Christian Home should take in the event that the husband and son did not survive her, and should be carried out; and the Court of Appeals rejected it in holding that the will by its terms vested the estate in Eugene Rhodes immediately on the testatrix' death, and that a *prima facie* right existed in the personal representatives of the son, which was not displaced by proof of the mother's survival.

The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail if consistent with the rules of law. And another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given. *Kenaday* v. *Sinnott*, 179 U. S. 616.

In this case, we think it is apparent that Mrs. Rhodes designed to dispose of her entire property; to provide for her husband by securing to him for life an income from one-half of her estate; to provide for her son by leaving him the estate absolutely, subject to the husband's income; and, if her son died before his father, that the husband should have the income of the whole estate for his life, and at his death the estate should go to the Young Women's Christian Home. But that if her husband and son should both be dead when she died, the estate should go at once to the charitable institution, that is to say, that if they did not survive her, the property on her death was immediately to take that destination.

But the argument is that the testatrix' wishes cannot be carried out, inasmuch as, it is insisted, each of the devises and bequests was on the express condition of survivorship, and to give effect to the alleged intention would require the interpolation of some phrase covering the contingency of inability to ascertain survivorship, which interpolation would be wholly inadmissible.

This, however, is matter of construction, and if the state of facts at the time of Mrs. Rhodes' death did not substantially differ from what the will shows she contemplated when it was executed, then no interpolation is required, and the property must go according to the intention necessarily deducible.

The applicable principle is well expressed by Mr. Justice Gray, then Chief Justice of Massachusetts, in *Metcalf* v. *Framingham*, 128 Mass. 370.

The case is stated in the head notes thus: "A testator bequeathed personal property in trust for the benefit of his wife's sister and her husband during their lives, as follows: During her life, to pay the net income to her semi-annually; in case she should die before him, to transfer one-half of the principal to a charitable institution, and to pay the income of the remainder to him during his life; in case he should die before her, then at her death to transfer the whole of the principal to the same institution. She died before her husband, and one-half of the principal was paid to the institution and the other half kept in trust for him. *Held*, that on his death the institution was entitled to this part of the principal also, and that it did not pass to the residuary devisees; although a similar bequest for the benefit of another husband and wife contained an express direction for a transfer of the second half of the principal to the charitable institution upon the death of the survivor."

Gray, C. J. said: "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

"It is a question in each case," said Mr. Justice Matthews in *Robison* v. *Portland Orphan Asylum*, 123 U. S. 702, "of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." In that case Robison left a will providing, thirdly, that his widow should have the income of all his estate, with the right to spend it, but not to have it accumulate for her heirs; fourthly, that if his sisters, Ann Smith and Eleonora Cummings Robison, "be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate so long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum," and one-third to each of two other institutions. Both sisters died before the testator.

It was ruled that the fact that the sisters died before their brother, "whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift;" that unless it appeared on the face of the will "that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora

Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift, which, by reason of the contingency, has failed;" and that considering the third and fourth subdivisions together, the limitations were to be taken as a complete disposition of his estate, in the mind of the testator, who did not intend to die intestate as to any portion thereof, giving to the widow an estate for life, with an estate over for life to the sisters, contingent on surviving the widow, and with the ultimate remainder to the charitable institutions.

In *Newell* v. *Nichols*, 12 Hun, 604, affirmed in 75 N. Y. 78, a wife had died leaving a husband and two children, a son and a daughter. By her will she created three funds, one of $30,000, the income of which was to go to her husband, and, on his death, the principal to the heirs of her body then living, and in default of such heirs to certain named remaindermen; another fund of $15,000, the income to be paid to the daughter during her life, the principal to be paid at her death to the heirs of her body then living; in default of such heirs, to her appointees by will; and in default of appointment, to the heirs of the body of the testatrix then living, and in default of such heirs, then to the same remaindermen; while a third sum of $15,000 was settled upon the son as to the income, with the same provisions as to the principal at his death as in respect of the daughter. The husband and children were lost at sea, and there was no evidence of survivorship between them. The case was decided at special term by Van Vorst, J., whose careful and elaborate opinion was adopted by the court in general term, and fully approved by the Court of Appeals. It was held that the intention of the testatrix plainly was that the limitation over to the remaindermen should be effectual if for any reason the children could not take, and that the death of the children without issue or appointment, under the circumstances, and in the absence of evidence of survivorship, entitled the remaindermen to have the limitation carried into effect.

It was observed by Van Vorst, J.: "Where a devise is limited to take effect upon a condition or contingency annexed to a preceding estate, if that preceding estate should not arise the remainder over will take place, the first estate being considered as a preceding limitation and not as a preceding condition. . . . As when a testator meant to dispose of all his property and uses the words, 'if the legatee should not survive,' held to mean 'if the preceding legacy should from any cause fail.'"

Underwood v. *Wing* and *Wing* v. *Angrave* are relied on to the contrary. 19 Beavan, 459; 4 De Gex, M. & G. 632; 8 H. L. Cas 183.

The facts were these: Underwood and his wife had three children—Catherine, Frederick and Alfred. Being about to emigrate with their children, Mr. and Mrs. Underwood made mutual wills, dated October 4, 1853. Mr. Underwood by his will devised his real and personal estate to Wing, his heirs, &c., in trust for Mrs. Underwood, her heirs, &c., abso-

lutely; and the will proceeded: "And in case my said wife shall die in my lifetime, then I direct that my said real and personal estate shall be held by my said trustee, upon trust for such of them, my three children, Catherine Underwood, Frederick Underwood and Alfred Underwood, as, being sons or a son shall attain the age of twenty-one years, and being a daughter, shall attain that age, or marry under that age, to be equally divided between or among them, share and share alike; and in case all of them my said children shall die under the age of twenty-one years, being sons, or under that age and unmarried, being a daughter, then I give, devise and bequeath all my real and personal estate, as aforesaid, unto and to the use of the said William Wing, his heirs, executors, administrators and assigns, to and for his and their absolute use and benefit." And the testator appointed his wife and defendant Wing executors. Mrs. Underwood by her will, made by virtue of a power, devised, bequeathed and appointed all the real and personal estate subject to the power, to Mr. Underwood, his heirs, &c., absolutely; and the will proceeded: "(Subject to the estates and interests of my children therein, under or by virtue of the will of the said John Tully, deceased.) And in case my said husband should die in my lifetime, then I devise, bequeath and appoint the said hereditaments and premises, and sum and sums of money, and arrears of income aforesaid, unto and to the use of William Wing, his heirs, executors, administrators and assigns, to and for his and their own absolute use and benefit." And she appointed her husband and William Wing executors.

Mr. and Mrs. Underwood and their three children embarked for Australia, their ship foundered, and all on board, with the exception of one sailor, perished. Both parents and the two boys were washed into the sea by the same wave, but the daughter survived for half an hour. All the children died under twenty-one and unmarried. Wing proved both wills and plaintiff obtained letters of administration of the estate of Catherine Underwood. 19 Beav. 459, 460.

The courts agreed in the conclusion that at common law there could be no presumption of prior decease in the absence of proof, although the evidence tended to show that the husband was in good health and an able swimmer, while his wife was in delicate health, and their children of tender age; and this ruling has ever since been accepted in the English courts and by the uniform current of authority in the United States.

Under the wills, the husband, wife and children, having practically died simultaneously, the intention of both testators that their estate should pass to Mr. Wing seemed plain, but the House of Lords (and the courts below) held otherwise, and that as Mr. Wing could not show either that the death of the husband occurred in the wife's lifetime, or that the wife's death occurred in the husband's lifetime, he could receive neither estate. In the construction which produced this result it cannot be said that the courts of

this country have generally concurred. Lord Campbell, then Lord Chancellor, dissented, and, referring to the wife's will, said: "Of course, I fully recognize all the cases where, there being in a will a gift really meant to be on condition, or the happening of a particular event, the court decided that it could not take effect unless the condition was performed, or the event had happened. But the present seems to me to be a case of substitution, to take effect on failure of the prior estate." Granting that effect is to be given to the expressed, not the conjectural or probable intention of testators, he thought that by this will the testatrix clearly expressed her intention that if her husband did not take the property, William Wing should take it. "The lapse of the bequest to her husband by his predecease being substantially the only event upon which the bequest to him could fail, when she says, 'In case my said husband should die in my lifetime,' does she not, in substance say, in case the bequest to my husband should fail, then William Wing is the object of my bounty, and all shall go to him? She has not provided for the event of there being an impossibility to determine whether she or her husband died first. But although she has not in terms provided for this event, she has clearly intimated her intention, that in case of the gift to her husband not taking effect, the ulterior gift to William Wing should take effect. And this seems to me not to be an interpolation into her will, but a necessary implication from what she has said. How can it be supposed that if she had foreseen the event of an uncertainty as to whether she or her husband died first, so that her husband could not take from that uncertainty, she would have altered the intention she had so plainly expressed in favor of William Wing? Can it be considered possible that William Wing would, in that event, have ceased to be the object of her bounty? What other destination of the property, by her, can be conjectured? If her husband should not take, William Wing was substituted for him. . . . It seems to me to be a fallacy to say that this was a gift merely on the happening of a particular event, unless that event is taken to be the failure of the prior gift to her husband."

It will be perceived that it was held that for the purpose of giving effect to the wills, the husband was not to be assumed to have survived the wife, nor the wife to have survived the husband; and yet, the wills having been thus eliminated, it was declared that the heirs and next of kin of Mr. Underwood were entitled to his property as though he had been the survivor, and that the heirs and next of kin of Mrs. Underwood should take her property as though she had been the survivor.

Whether in a given case a condition precedent, a condition subsequent, or a conditional limitation, is prescribed, is, in the absence of unmistakable language, matter of construction. And conditions cannot be

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annexed from words capable of being interpreted as mere description of what must occur before the estate given can arise. *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35.

As in all of these cases, so in this, we are remitted to the language of the will to ascertain the intention of the testatrix, and if that intention is clearly deducible from the terms used, taking the whole will together, then we are bound to give that construction which will effectuate and not defeat it. Reading this will from the standpoint of the testatrix, as we must, we think it not open to doubt that she intended to dispose of all her estate, and did not intend to die intestate as to any part of it; that she had in mind only three objects of her bounty, her husband, her son and the Home, and that her intention, failing husband and son, was that the Home should take. If husband alone survived it was to go to the Home at his death. If neither husband nor son survived it was to go to the Home at once. Is her manifest intention to be defeated because instead of saying "If neither my husband nor my son should survive me, I give and bequeath my property to the Home," she said: "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I give and bequeath all my property to the Young Women's Christian Home?"

We do not feel compelled to so hold, and, by accepting so technical and literal a view, to reach an adverse result on the theory of a change in the burden of proof, or of an accidental omission to prevent it. This is not a case of supplying something omitted by oversight, but of intention sufficiently expressed to be carried out on the actual state of facts. And as the estates of persons perishing in a common disaster, intestate, notwithstanding the statutes of descent and distribution may not have made provision in respect thereof, are disposed of as if each survived as to his own property, we think, upon principle, that the property of Mrs. Rhodes should go as directed as if she survived her son, in the absence of proof to the contrary.

It necessarily follows that title did not *prima facie* vest in the son, who is not shown to have survived his mother, and must be taken to have died at the same time. The property remained where it was vested, there being no evidence to show that it had been divested.

The situation is illustrated by the case of *In re Willbor*, 20 R. I. 126. There Charlotte, Martha and Eliza Willbor, three sisters, perished in the same calamity, and there was nothing from which it could be inferred that either survived the other. Each left a will devising all her real and personal property, excepting certain legacies, to her two sisters, or either of the survivors, and to their heirs and assigns forever. The Supreme Court of Rhode Island said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be

inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. . . . If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters or either of the survivors did not take effect, there being no interval of time as between the deaths of the three during which titles to property could vest, and the wills therefore stand as if they contained only the bequests to the legatees subsequently named."

The result is that the property passed under the will to the Home, and neither the next of kin of the mother nor the next of kin of the son can defeat its destination.

The decree of the Court of Appeals is reversed and the cause remanded with a direction to affirm the decree of the Supreme Court.

True copy.

Test:

Clerk Supreme Court, U. S.